Part 1 The Legal Environment of Business CHAPTER 1 An Introduction to the Fundamentals of Dynamic Business Law Page 1 LEARNING OBJECTIVES LO 1-1 Define business law. LO 1-2 Relate the functional areas of business to the relevant areas of business law. LO 1-3 Recall the purposes of law. LO 1-4 Distinguish among types of law. LO 1-5 Differentiate between sources of the law. LO 1-6 Identify the various schools of jurisprudence. LO 1-1 Define business law. Page 2 This book is for future business managers, especially those who wish to be leaders. An essential factor in preparing for that career is awareness of the legal issues arising in business. Businesses need to finance capital growth, purchase inputs, and hire and develop employees. In addition, they must sell to consumers, please owners, and comply with government rules. All these activities are full of potential legal conflicts. The conflicts reflected in legal principles and court actions are not simply about abstractions like interests and rights. They are usually about money---who has it, who owes it, and who deserves it. The anger and fear pervasive in legal conflicts affect who has the money at issue at the end of the day. The significance of struggles over money makes it all the more important that business managers learn the basic language of law as soon as possible in their professional training. A theme of this book will be a surprising number of legal implications that result from what on the surface might look like a simple, everyday business decision. Think along with us about the desire of a young entrepreneur who has a new idea and wants to develop its market potential. In the seemingly ever-expanding market for smart phone apps, individuals are often rewarded for creating apps that make lives simpler or that entertain people. You have watched the business success of hundreds of smart phone applications. You have certainly downloaded your share of them. You have an idea for a phone app that you believe has the potential to become the next Vine or Instagram. Your proposed app will allow users to search for lawyers based on the location and specialization that the user desires. The app will also rate different lawyers and provide personal information about the lawyers who are being rated. Your goal is to make it easier for uninformed consumers to locate the lawyer best suited for their needs. You and a friend, who has a background in computer science, develop software to run the application. You also create a design for the app: what the app will look like and how it will function. After you complete the design of the app, you decide that you would like to upload it to the Apple App Store. You contact Apple, and a representative tells you that you will be able to upload the app if you pay a fee and sign a few forms. In this textbook, you will find legal concepts and terms that will allow you to see this scenario with different eyes. What you will learn will warn you about the dangers of letting

the excitement of the moment—your big moment—cause you to forget that business is, in part, a series of conflicts. And, in those struggles, you need to understand your interests and responsibilities. From the instant you first interact with another party in a business relationship, insights from your study of business law should kick in to protect you. Let’s walk through just a small sample of the legal issues you will face as you try to make your app the next big thing. Because you need a platform on which to sell your app, you will need to establish a contract with an app store such as the Apple App Store. This book will teach you about the elements required to establish a legal contract. In other words, only certain kinds of legal agreements will provide legal protection if a later dispute arises. Whether these elements are met will dictate whether the party with whom you are contracting is obligated to perform a certain duty. For example, if you believe that Apple has a legal duty to put your app in its App Store or, perhaps, place your app in a particular position in its online store, you would have to prove that a contract creating such a duty exists. The knowledge you will gain regarding contract law will also help you understand the complexity of the relationship between you and the user purchasing your app. For example, if the app you created malfunctions after a user has purchased it, how will you and the customer settle a dispute? Will you go to court, or would you prefer disputes to be settled through alternate dispute resolution methods such as arbitration? Will you create a binding arbitration clause to require consumer disputes to be resolved through arbitration? After reading this textbook, you will become more aware of the various conflict resolution mechanisms available to businesses and consumers. In addition to the contractual issues underlying your app business, you will also need to be aware of possible tort issues related to your app. (A tort, at its simplest level, is legal language for a civil [noncriminal] harm committed against another in which the injured party can sue for damages.) For example, because your app will compare the desirability of certain lawyers to others, the lawyers whom you are rating might feel threatened by your app. Will these lawyers be able to file a suit in tort against you for defamation or privacy torts such as false light or public disclosure of private facts? Page 3 Alternatively, what can you do when a competing business writes a column in a newspaper mocking and generally trashing your new app? To answer that question, you need a good understanding of the torts of disparagement or slander of quality, two torts that you might be able to use to defend your business against fraudulent claims. The sections in this textbook on tort law will enable you to ask questions about potential tort claims related to the eventual marketing of your app. Later, when you market your app, you will also have to be aware of

the restrictions on advertising that exist under consumer protection laws. Will you make any promises to consumers regarding your app in your advertisements? Will these advertisements constitute legally permitted puffery, or will they be deceptive advertisements under the Federal Trade Commission Act? As you read about consumer law in this textbook, you will learn about the restrictions the law places on advertising. When you design your app, you will have to make sure that you do not infringe on the intellectual property—such as patents or trademarks—of other app businesses. What words and symbols will you use? Do those words and symbols constitute trademark infringement? This book will explain the intellectual property law that governs the invention of an app. Finally, once you have studied this book, you will realize the importance of carefully selecting the form of business organization you and your friend choose for operating this app. For example, will you operate the app under a sole proprietorship or a partnership agreement? As you will learn, each of these forms of business organization provides you with different advantages and disadvantages. Business law consists of the enforceable rules of conduct that govern commercial relationships (“commercial” meaning “for the purpose of making a profit”). For example, a firm is required by law to obey the antitrust laws when it considers merging with another firm. In other words, buyers and sellers interact in market exchanges within the rules that specify the boundaries of legal business behavior. Constitutions, legislatures, regulatory bodies, and courts spell out what market participants may and may not legally do. These rules and responsibilities provide the stability required in a thriving market economy. LO 1-2 Relate the functional areas of business to the relevant areas of business law. Understanding business law is necessary for future businesspeople because there simply is no market transaction that occurs outside legal guidelines. All contracts, employment decisions, and payments to a supplier are limited and protected by business law. Each of the six functional areas of business—management, production and transportation, marketing, research and development, accounting and finance, and human resource management—sits on a foundation of business law.

Law and Its Purposes LO 1-3 Recall the purposes of law. Many of us might like to impose rules on others, defining their rights and responsibilities. Few of us can do this as individuals, but a majority of citizens in a democracy can

agree to establish rules for business behavior. They can permit certain authorities to make and enforce rules describing what behavior is permitted and encouraged in their community. These rules are what we refer to as the law, and they are enforceable in the courts of that community. Exhibit 1-1 lists a few of the numerous purposes fulfilled by the law. Exhibit 1-1 is a reminder of why we are very proud when we say we are a society of laws. The respect we give to the law as a source of authority is in part a recognition of the fact that in the absence of law, we would rely solely on the goodwill and dependability of one another. Most of us greatly prefer the law to that option.

Classification of the Law LO 1-4 Distinguish among types of law. Page 4There are many ways of thinking about the law. For example, we can divide law into national versus international law, federal versus state law, and public versus private law. Private law involves disputes between private individuals or groups. As an illustration, if a businessperson owns a computer equipment store and is delinquent in paying rent to the landlord, the dispute between them entails private law. Public law involves disputes between private individuals or groups and their government. For instance, if a computer store dumps waste behind its building in violation of local, state, or federal environmental regulations, the resulting dispute focuses on public law. Exhibit 1-1Purposes of the Law Providing order such that one can depend on a promise or an expectation of obligations. Serving as an alternative to fighting. Facilitating a sense that change is possible, but only after a rational consideration of options. Encouraging social justice. Guaranteeing personal freedoms. Serving as a moral guide by indicating minimal expectations of citizens and organizations. Another distinction among types of laws is civil law versus criminal law. Civil law involves the rights and responsibilities found in relationships between persons and between persons and their government. It also involves the remedies available when someone’s rights are violated. For example, in 2009, Mississippi Valley Silica Co. was ordered to pay a plaintiff $9 million because the court ruled that it sold sand to the plaintiff’s employer with the knowledge that using that sand on a regular basis would expose a worker to a form of cancer. Yet, Mississippi Valley did not alert those who bought the sand about the risk. In contrast to civil law, criminal law applies to situations in which someone commits an act against the public as a whole. There are several business activities that can be

considered criminal, such as money laundering, bribery, mail fraud, racketeering, price fixing, insurance fraud, embezzlement, and theft of trade secrets. These crimes are prosecuted not by individuals but by the state or federal government. One example of a criminal law is the prohibition against insider trading on the stock exchange. Insider trading occurs when an individual uses insider, or secret, company information to increase her or his own finances or those of family or friends. For example, several years ago, an IBM secretary allegedly told her husband, who told several other people, that the company was going to take over operations of Lotus Development. This information was spread among a number of individuals before it was publicly announced. On the basis of this leak, 25 people bought stock that increased greatly in value following IBM’s public announcement. The Securities and Exchange Commission filed charges against the 25 stock purchasers because they were creating an unfair trading environment for the public.

Sources of Business Law LO 1-5 Differentiate between sources of the law. How is law created, and where do we look to find the laws? Constitutions The United States Constitution and the constitution of each state establish the fundamental principles and rules by which the United States and the individual states are governed. The term constitutional law refers to the general limits and powers of the federal and state governments as stated in their written constitutions. The U.S. Constitution is the supreme law of the land, meaning that it overrules all federal, state, and local laws that conflict with it and is the foundation for all laws in the United States. It is the primary authority to study when trying to identify the relationship between business organizations and government. Statutes Page 5 Legislative actions, called statutes, are another important source of law. The assortment of rules and regulations put forth by legislatures is what we call statutory law. These legislative acts can be found in the U.S. Code when they are passed by Congress or in the various state codes when they are enacted by state legislatures. The codes are a collection of all the laws in one convenient location. Because so much business activity occurs within the jurisdiction of state courts, business managers must be familiar with the local city and county ordinances that govern matters not covered by federal or state codes. These ordinances address important business considerations such as local taxes, environmental standards, zoning ordinances, and building codes.

For example, if you want to open a Krispy Kreme franchise in Santa Fe, New Mexico, you must follow local guidelines regarding the area where you may build your store, the materials that you may use to build, and the state minimum wage that you must pay to employees making donuts. The regulations will be different if you want to open your franchise in Toledo, Ohio, or in Seattle, Washington. Although they are not a source of law in the same sense as constitutions and statutory law, model or uniform laws serve as a basis for some statutory law at the state level. Business activity is made more difficult when state laws vary. To prevent such problems, a group of legal scholars and lawyers formed the National Conference of Commissioners on Uniform State Laws (NCC). The NCC regularly urges states to enact model laws to provide greater uniformity of law. The response is entirely in the hands of the state legislatures. They can ignore a suggestion or adopt part or all of the proposed model law. The proposals of the NCC, though not laws themselves, have been adopted on more than 200 occasions by state legislatures. The NCC is an especially important influence on business law. Paired with the publications of the American Law Institute, the NCC became the source of the Uniform Commercial Code (UCC). The UCC is a body of law so significant for business activities that it will be the focus of intensive study in several chapters of this text. The UCC laws include sales laws and other regulations affecting commerce, such as bank deposits and collections, title documents, and warranties. For example, these laws govern the different types of warranties that companies such as Microsoft, Sony, and Honda provide with their products. Cases Constitutions, legislatures, and administrative agencies encourage certain behavior and prevent other actions. But the boundaries of these laws are seldom self-explanatory. Consequently, law must be interpreted. Case law is the collection of legal interpretations made by judges. An alternative name for case law is common law. These interpretations are law unless they are revoked later by new statutory law. Judicial opinions are especially significant for businesses because a modern business often operates in multiple legal jurisdictions. Because statutory laws are subject to interpretation, one court may have interpreted particular laws one way at one business location, and a second court may interpret a similarly worded statute differently at a second business location. We will often refer to these judicial opinions as “cases.” Be sure to distinguish judicial opinions in your mind from the business cases you may study in your other business classes, where the cases refer to business situations where you are being asked to apply the business principles you have learned. Courts issue judicial decisions that often include interpretations of statutes and administrative regulations. These decisions

contain the reasoning the courts use to arrive at their decisions. The reasoning depends heavily on precedent, the use of past decisions to guide future decisions. An earlier decision in a similar fact pattern is a precedent that guides later decisions, thereby providing greater stability and predictability to the law. Page 6 The 2014 case of Air Wisconsin Airlines Corp. v. Hoeper (No. 12-315, slip op. Sup. Ct. January 27, 2014) provides an illustration of how important knowledge of business law and precedent can be. Mr. Hoeper was a pilot for Wisconsin Air. He needed to be certified to fly a new kind of aircraft his employer bought. At the conclusion of his fourth failed attempt to be certified, Mr. Hoeper raised his voice, tossed his headset, used profanity, and accused the instructor of railroading him. The manager who booked a return flight for Hoeper discussed Hoeper's behavior with officials of Wisconsin Air. They knew that Hoeper was licensed to carry a firearm. Consequently, an airline executive warned the Transportation Security Administration (TSA). During the call, the executive said that the airline was concerned about Hoeper's mental stability and the whereabouts of his firearm. The TSA removed the pilot from the airplane, searched him, and questioned him about the whereabouts of his firearm. Hoeper sued for defamation. The jury found for Hoeper, and the Colorado Supreme Court agreed with the jury on appeal. When the U.S. Supreme Court heard the case, it reversed the decision, finding against Hoeper's defamation claim. In the course of that opinion, Justice Sotomayor, writing for the Court, relied heavily on the earlier Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) case for precedent. Hoeper maintained that the Wisconsin Air executive who warned the TSA should have qualified the concern about the location of Hoeper's weapon by saying that "it had no reason to think he actually was armed." But Justice Sotomayor pointed out that Masson provided that in a defamation action a materially false statement would have to be one that would have had a different effect on the mind of the listener from that which the truth would have produced and, in this case, a reasonable TSA officer would have searched the pilot for a gun after hearing that the pilot was upset. It is crucial for business managers to pay attention to changes in the law and cases in which new precedents are set. These precedents must be taken into account when making future business decisions. For instance, courts sometimes make new rulings regarding the kinds of warnings companies should be required to provide to consumers about potential harm that could result from their products. One example was a case filed against McDonald's. After a woman was severely burned by very hot coffee, the company was found negligent for failing to provide a warning label on its hot-beverage cups. Now many retailers of hot beverages provide

warning labels on their beverage cups because of the precedent that was set by this case. When courts rely on precedent, they are obeying stare decisis ("standing by the decision"). Following stare decisis creates greater predictability for both businesses and individuals that look to the courts for the rules on which they should rely when they engage in market exchanges. In accordance with stare decisis, rulings that are made in higher courts become binding precedent for lower courts. Even though this practice is meant to create a consistent and reliable justice system, different judges may view the facts of a case in different ways. In addition, courts are sometimes presented with a new issue and do not have a binding decision to follow. In such instances, they may look to decisions made in similar cases by nonbinding courts in other states or jurisdictions. If a new issue comes before two state courts and there is no binding decision from the state supreme court, both state courts need to look for other rulings on similar cases. They are not bound by each other's decision, so they might have different decisions on the same subject. The decisions in these lower courts can be appealed to the state appeals court, however, and the appeals court's decision can be appealed to the state supreme court. One example of a case that has been used in accordance with stare decisis as a binding precedent is Brown v. Board of Education,1 which abolished discriminatory policies for individuals of different racial backgrounds. For instance, in Regents of the University of California v. Bakke,2 the plaintiff, a white male, had applied to the University of California at Davis medical school two years in a row and been denied admittance. He alleged that the admissions process was discriminatory because out of 100 slots, 16 were reserved for members of minority races. The U.S. Supreme Court found that the school's admissions policy was not legal, referencing Brown and stating that the basic principle behind it and similar cases was that individuals could not be excluded on the basis of race or ethnicity. The Court wrote, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Page 7 Just as state statutes have been strongly influenced by the suggestions of the NCC, common law evolves with the assistance of a mechanism called Restatements of the Law. These Restatements are summaries of the common law rules in a particular area of the law that have been enacted by most states. In addition to the Restatements, many influences are at work in the minds of judges when they interpret constitutions, statutes, and regulations. For example, the values and social backgrounds of the judges function as lights and shadows, moving the judges toward particular legal decisions. Administrative Law Constitutions and statutes are never complete in the sense of covering all the detailed

rules that affect government and business relations. The federal government, as well as state and local governments, has dozens of administrative agencies whose task is to perform a particular government function. For example, the Environmental Protection Agency (EPA) has broad responsibilities to enforce federal statutes in the area of environmental protection. Administrative law is the collection of rules and decisions made by all these administrative agencies. Just glance at Exhibit 1-2 to get a sense of the scope of a few of the major federal administrative agencies. Businesses function within the rules established by agencies like these. For example, the Occupational Safety and Health Administration (OSHA) oversees health and workplace safety and makes sure that employees are working in conditions that are not hazardous. In 2015, illustrating the implications of OSHA for business managers, Walmart was fined $7,000 when a store in Valley Stream, New York, did not “furnish a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling.” Walmart’s managers and employees failed to provide effective crowd management training and did not use appropriate crowd management techniques to safely manage a large crowd of approximately 2,000 customers. Exhibit 1-2Major Federal Administrative Agencies INDEPENDENT AGENCIES EXECUTIVE AGENCIES Commodity Futures Trading Commission (CFTC) Consumer Product Safety Commission (CPSC) Equal Employment Opportunity Commission (EEOC) Federal Trade Commission (FTC) Federal Communications Commission (FCC) Interstate Commerce Commission (ICC) National Labor Relations Board (NLRB) National Transportation Safety Board (NTSB) Nuclear Regulatory Commission (NRC) Securities and Exchange Commission (SEC) Federal Deposit Insurance Corporation (FDIC) Occupational Safety and Health Administration (OSHA) General Services Administration (GSA) National Aeronautics and Space Administration (NASA) Small Business Administration (SBA) International Development Cooperative Agency (IDCA) National Science Foundation (NSF) Veterans Administration (VA) Office of Personnel Management (OPM) Treaties A treaty is a binding agreement between two states or international organizations. Treaties may be called several things: international agreements, covenants, exchanges of letters, conventions, or protocols. In the United States, a treaty is generally negotiated by the executive branch. To be binding, it must then be approved by two-thirds of the Senate. A treaty is similar to a contract in two important ways. Both treaties and contracts are attempts by parties to determine rights and obligations among themselves.

In addition, when a party fails to obey a treaty or an international contract, international law imposes liability on that party. Executive Orders Page 8The president and state governors can issue directives requiring officials in the executive branch to perform their functions in a particular manner. The Code of Federal Regulations (CFR) contains all the executive orders created by the president. (The CFR is online at https://www.govinfo.gov/help/cfr.) Presidents claim the power to issue such orders on the basis of their Article II, Section 1, constitutional power to “take care that the laws be faithfully executed.” President Biden issued 28 executive orders during his first three weeks, making him the president who has issued the most executive orders ever in that initial period of a presidency. His level of activity is a continuation of a trend toward Executive Branch assertiveness amidst a general sense that legislatures move too slowly to address immediate problems. An illustration of an especially controversial executive order is Order 9066, issued by President Franklin Roosevelt during World War II. On the basis of this order, Japanese-Americans on the West Coast, as well as thousands of Italian-American and German-American families, were sent to internment camps for the duration of the war. Schools of Legal Interpretation LO 1-6 Identify the various schools of jurisprudence. When legislators or courts make law, they do so guided by certain habits of mind and specific beliefs about human nature. These views guide them toward particular legal solutions and away from others. This section briefly describes several of the more common guides to legal interpretation. The point of learning about these alternative methods for interpreting the implications of particular legal facts is to encourage you to see the law as a human creation shaped by many perspectives and approaches to what a court decision or statute means. That there are multiple interpretations of a statute or a set of facts does not mean that all are equally thoughtful or directly relevant. Instead, considering alternative perspectives serves to broaden the necessary narrowness of the perceptions of individuals. Identification with the Vulnerable Some thoughtful legal scholars claim that our very nature as humans compels us to advance the law on the basis of identification with the vulnerable. Some members of our society can take care of themselves in terms of most life situations. Others, especially the ill, children, the aged, the disabled, and the poor, require assistance to meet their fundamental needs of life, health, and education. This guide to legal change is tied closely to the pursuit of fairness in our society. The metaphor of a level playing field is linked with some higher law or body of moral principles that connects all of us in the human community. We might look at a particular employment contract, for example, and react by observing that “it is just not fair.” Our caring impulse as a

human feels outrage at that legal arrangement. That outrage can be a stimulus for legal change. One example of identification with the vulnerable is minimum-wage laws. They reflect the beliefs that workers should receive a minimum hourly wage and that employers should not be allowed to pay them less. Historical School: Tradition One of the most often used guidelines for shaping the law is tradition, or custom, which is also called the historical school. Stare decisis is rooted in this perspective. When we follow tradition, we attempt to link our future behavior to the behavior of those who faced similar problems in earlier historical periods. The logic of the approach is that we need not reinvent the wheel each time a legal problem arises. Past practice is assumed to have been the product of careful thought. Originalism is a theory of interpretation of legal texts—particularly the Constitution—that believes that these texts should be interpreted according to their “original meanings.” Some originalists argue that a text should be interpreted according to the intentions of its authors (e.g., the Constitutional Framers). Others hold that the words of a legal text should be read with their “original public meaning,” or the meaning the public gave to the words at the time of writing. Although there are various shades of originalism, a core goal shared by most originalists is to read legal texts in an objective way without imposing our own modern interpretations of them. Originalists use a variety of resources to try to determine the original meaning or intent of a legal text. An originalist might use a dictionary, grammar book, or similar legal document from the time to determine how a particular word was used by lawyers, legislators, or the public. Originalists hope that by using the original meaning of the words of a legal text or the original intent of its authors, our law will be applied more objectively and fairly. Legal Realism Legal realism is based on the idea that, when ruling on a case, judges need to consider more than just the law. This school of thought dictates that they also take factors such as social and economic conditions into consideration when making a judgment. Followers of legal realism argue that the law must not be the sole factor in deciding a case since legal guidelines were designed by humans and exist in an ever-changing society. Judges who follow this school of thought are more likely to depart from past court decisions to account for the fact that our society is constantly shifting and evolving. Those who subscribe to legal realism also believe that the law can never be enforced with complete consistency. They argue that because judges are human, they will bring different methods of reasoning to very similar cases. Page 9One example of a law that has been enacted to reflect changes in our society is the Family and Medical Leave Act (FMLA). This act mandates that businesses employing more than 50 people must provide their workers with up to 12

weeks’ unpaid leave every year to take care of family-related affairs such as caring for ill parents, adopting a child, or having a child. The FMLA protects pregnant women who take time off work because their employers must provide them with the same pay and the same or an equivalent job when they return to work. This act reflects the fact that more mothers are working outside the home and more women are returning to work soon after they have a child. The FMLA also protects new parents against some types of employer discrimination that might occur after they return to work. Cost-Benefit Analysis From this perspective, we need to examine all the costs and benefits for alternative laws or decisions and place monetary values on those costs and benefits. If we possessed those calculations, we could use cost-benefit analysis as a guide to legal change, choosing the legal alternatives that maximize the ratio of benefits to costs. For instance, in a contract dispute, someone using this approach would attempt to attach responsibility for the problem in such a way that total benefit is maximized in relation to costs. This approach to legal change is tied closely to the pursuit of efficiency. If a law yields more benefits than costs, then we have saved resources. Those resources can, in turn, be used to provide us with more goods and services. Our economy is thus more efficient in the sense of producing more for less. For example, regulations enacted by the EPA can affect costs and benefits in the national economy. Polluted land is an economic loss because it cannot be used for farming or recreation. Polluted water can be toxic for fish and cannot be used for drinking. Polluted air can cause health problems and result in higher health care costs. Although EPA regulations may end up costing companies more initially to control pollutants, the cost of environmental cleanup, and the loss of productivity in the economy as a whole, may be greater than the resources companies expend to control pollution.

Global and Comparative Law Comparative and international law is extremely important for future business managers. Because of advances in technology and transportation, trade with other countries is far easier today than it was in past years. Now it is possible to make different components for the same product in various countries all over the world and then assemble them in another country. It is possible to operate an antique store in Poughkeepsie but sell to customers in Moscow or Taipei through a website. As a result of this ease in trade, business managers must be familiar with global trade laws

that regulate business practices among nations. For instance, the United States and other countries have entered into agreements such as the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT). These agreements help establish the conditions of trade between countries. In 1995, the World Trade Organization (WTO) was created to replace GATT. The WTO stimulates negotiations among member nations to reduce barriers to international trade. The WTO attempts to enforce trade agreements governing trade among its 160 member nations. In this role, it serves as a world court adjudicating trade disagreements that threaten to disrupt international trade. It is also important for future business managers to understand comparative law, comparing and studying the laws in different countries. Business managers need to be aware of various trade laws and restrictions in different countries so that they can act accordingly when they set out to do business in those countries. The European Union, for example, has laws that differ from those of the United States in terms of regulating the taxes on Internet sales and the amount of pollution that can be released into the environment. Companies doing business in the EU must take these standards into account. Page 10 For example, contrast the extent that the Chinese and American governments explicitly gather data on their citizens. The Chinese government does not want its citizens to have access to certain information and websites. A Chinese cybersecurity law that went into effect in June 2017 requires firms that do business in China to store in China all data that firms have on Chinese citizens and businesses. The law includes further strict guidelines, including ensuring that the data contains no “state secrets prior to transferring the data outside the country” (though the Chinese government decides what information is considered a “state secret”). The law also requires any “critical network equipment” and “specialized cybersecurity products” to be approved by the Chinese government before they can be sold in China (likely included to ensure that the products cannot bypass China’s internet restrictions). One of the impacts of the 2017 law was the creation in 2021 of the Personal Information Protection Law that governs the processing of personal information of individuals located in China, regardless of whether the entities processing that information are in China. As an additional illustration of the importance of being aware of the diversity of law in different countries, just imagine the problems that could arise if you were to need space for your business in Vietnam, but the only property law you knew was U.S. property law. In the United States, we take for granted the right to purchase a piece of property if we have the money to do so. Property is not so freely available and transferable in all nations. Vietnam’s new constitution, written in 1992,

provides guidelines for the allocation, transfer, and sale of private property. However, it still asserts that the people, or the state, own all the land. Thus, if individuals or private enterprises want to use land, they must pay tax on it as a form of rent and are granted a “use of right” that entitles them to extended use and the freedom to transfer the property. Technically, they are transferring not the property but, rather, the right to use it. Transference of property rights can occur only with the approval of a state official. The official ensures that the new owner intends to use the land for the original, state-approved purpose. Moreover, the new owner can never be given a longer term of right or more extensive rights over the land than the original owner had. Finally, the state official determines the price that the property will be transferred for. The government has specified certain prices depending on how the land is used. Modern business managers must have an ongoing fascination with the law to function effectively. Business law tells business managers the basic rules of the business game. Play any game without having first studied the rules, and you will probably fail. But, unlike an ordinary game, the business game has a rule book that is changing dynamically. In addition, increased globalization requires business leaders to be alert to legal differences among national jurisdictions. PRACTICAL TIPS for Business Managers Remember that the meaning and implications of laws are a matter of interpretation. Therefore, it is wise, if possible, to consult with more than one lawyer when you are curious about the meaning of a law that is immensely important to your operations. Try to stay current with your knowledge of law relevant to your industry and that of your suppliers. Law evolves, and yesterday’s law may not be today’s law. When you engage in any international commercial activity, be sure to investigate the law of countries in which you are doing business.

Questions & Problems Page 11 What is the difference between private law and public law? What are the main distinctions between the different schools of legal interpretation? If there are different ways to interpret statutes and case decisions, would it make sense to say that all interpretations of the law are equally appropriate? Presidential elections are partially about who will be able to select Supreme Court judges. As you look at the various alternative ways to interpret and apply the law, which of those methods of interpretation would you hope is held by your favorite candidate for president? Most business managers know they need to consult a lawyer when they make

important business decisions. If that assumption is correct, why would managers or entrepreneurs need to have any knowledge of business law? Couldn't they just ask the lawyer? Appendix 1A provides guidance for becoming a better critical thinker. A recent Forbes poll of business leaders found that the most important skill business leaders are seeking in their employees is critical thinking. As you study the appendix, why do you think this skill of critical thinking is so valuable to business managers? This chapter distinguishes between private and public law. Why are the interests of the public identified with the behavior of the government? Why would public law not be a term referring to the interests of corporations, for example? What is the need for a special area of law for administrative agencies? Why would the law as it applies to businesses not apply just as well to administrative agencies? Choose an area of law that fascinates you. Spend some time on the Internet searching for differences between how the United States and other countries respond to conflicts among people within that area of law, just as we did in the text in the illustration of real property law in Vietnam. Jarold Daniel Friedman worked as a temporary computer contractor for a pharmaceutical warehouse. The warehouse offered him a permanent position, but the warehouse required him to get a mumps vaccine, grown in chicken embryos, as a condition of his permanent employment. Friedman, a vegan, believed that the vaccination would violate his religious beliefs and declined to be vaccinated. As a result, the warehouse withdrew its offer of employment. Friedman claimed that the warehouse discriminated against him on the basis of religion. Do you agree with Friedman? Do employers have a duty to respect the beliefs of their employees? If so, what happens when that duty conflicts with employers' duty to provide a safe and healthy work environment? Source: Friedman v. Southern California Permanente Medical Group, 102 Cal. App. 4th 39 (2002).

APPENDIX 1A Critical Thinking and Business Law Success in the modern business firm requires the development of critical-thinking skills—the ability to understand what someone is saying and then to apply a set of evaluative criteria to determine the worth of what was said. In other words, businesspeople need to be able to sort sense from nonsense by evaluating arguments about relevant business law. A critical thinker is always asking, "Now does that make sense?" And there is no better context in which to develop critical-thinking skills than in the study of the laws that affect

business. Critical-thinking skills learned in the study of business law will be easily transferred to the decisions of business stakeholders. Legal reasoning is similar to other reasoning in some ways and different in others. When people, including lawyers and judges, reason, they do so for a purpose. Some problem or dilemma bothers them. The stimulus that gets them thinking is a legal issue. It is stated as a question because it is a call for action. It requires us to do something, to think about answers. For instance, we may be interested in such issues as the following: When are union organizers permitted under the National Labor Relations Act to trespass on an employer's property? Do tobacco manufacturers have liability for the deaths of smokers? Must a business fulfill a contract when the contract is made with an unlicensed contractor in a state requiring all contractors to be licensed? Page 12Each of these questions has several potential answers. Which answer best accomplishes a particular business objective? Which answers are consistent with the law? Here is where critical thinking is essential to business success. Some answers can get the decision maker into trouble; others will advance the intended purpose. Each answer is called a conclusion. Business firms often come into contact with such conclusions in the form of laws or court decisions. Business managers are therefore both consumers of and contributors to these legal conclusions. As businesspeople learn about and react to decisions or conclusions made by courts, they have two primary methods of response: Memorizing and understanding the conclusions or rules of law as a guide for future business decisions. Making judgments about the quality of the conclusions. This book encourages you to do both. There are many forms of critical thinking, but they all share one characteristic: they focus on the quality of someone's reasoning. Critical thinking is active; it challenges each of us to form judgments about the quality of the link between a set of reasons and the conclusion supposedly derived from them. In particular, we will be focusing on the link between a court's reasons and its conclusions. Our reactions to legal arguments shape our efforts either to support the status quo in the legal environment of business or offer support for particular changes. The following structure for critical thinking is a thoroughly tested method that successful market decision makers use. Every time you read a case, try to follow this pattern of careful thinking: Find the facts. Facts: Here, we are looking for the most basic building blocks in a legal decision or argument. These building blocks, or facts, provide the environment or context in which the legal issue is to be resolved. Certain events occurred, certain actions were or were not taken, and particular persons behaved or failed to behave in specific ways. All of these and many more possibilities together make up the intricate setting for

the playing out of the issue in question. We always wonder, “What happened in this case?” A major feature of this book is called “But What If.” This feature highlights the importance of facts in legal reasoning by focusing attention on the huge effect of changes in single facts on success or failure in a legal dispute. Look for the issue. Issue: In almost any legal conflict, finding and expressing the issue is an important step in forming our reaction. The issue is the question that caused the lawyers and their clients to enter the legal system. Usually, there are several reasonable perspectives concerning the correct way to word the issue in dispute. Don’t let the possibility of multiple useful ways to word the issue cause you any confusion. The legal issue is certainly not just anything that we say it is. Identify the judge’s reasons and conclusion. Reasons and conclusion: Judges do not form legal conclusions on the basis of whim. They have support for their decisions. That support consists of their reasons. When we ask someone why a judge formed a particular conclusion, we are showing our respect for reasons as the proper basis for any assertion. We want a world rich with opinions so that we can have a broad field of choice. But we should agree with only those legal opinions that have convincing reasons supporting the conclusion. Asking “Why?” is our way of saying, “I want to believe you, but you have an obligation to help me by sharing the reasons for your conclusion.” Locate in the decision the rules of law that govern the judge’s reasoning. Rules of law: Judges cannot offer just any reasoning that they please. They must always look back over their shoulders at the laws and previous court decisions that together provide an anchor for current and future decisions. What makes legal reasoning so complex is that statutes and legal findings are never crystal clear. They may seem very clear, but judges and businesspeople have room for interpretive flexibility in their reasoning. Apply critical thinking to the reasoning. Evaluation of the reasoning: A judge’s reasoning, once it has been laid before us by following the steps discussed here, is a message that we may either accept or reject. One of the most exciting things about our legal system is its potential for change. Critical thinking in the legal context consists of examining the legal opinion in search of potential problems in the reasoning. Page 13 Here is a small sample of some especially useful critical-thinking guidelines for business managers to apply when thinking about business law: Look for potential ambiguity in the reasoning. The term ambiguity refers to a lack of clarity in a word or phrase in the reasoning. Many words have multiple meanings; until the intended meaning is discovered, we cannot tell whether we want to agree or disagree with the reasoning. Ask whether the analogies used in the decision are strong. When judges follow particular precedents, they are saying that the key similarities

between the facts in the precedent and those in the case at hand are so similar that it makes sense to apply the same rule of law in both. Are there key differences in the factual situations that raise questions about the quality of that analogy? Check the quality of the judge's use of evidence in his or her reasoning. Is the evidence used by the judge to support the opinion both abundant enough and reliable enough that we should agree with the reasoning? Think about the extent to which important missing information prevents you from being totally confident about the judge's reasoning. Is there important missing information that you would need to have before making up your mind? Consider the possibility of rival causes. When the judge claims that one action caused another, think about whether some alternative cause may have been responsible.

Part 1 The Legal Environment of Business CHAPTER 2 Business Ethics and Social Responsibility Page 14 LEARNING OBJECTIVES LO 2-1 Distinguish between business ethics and the social responsibility of business. LO 2-2 Recognize the relationship between business law and business ethics. LO 2-3 Define values. LO 2-4 Explain how values provide a starting point for thinking about business ethics. LO 2-5 Analyze business decisions using the WH framework. LO 2-1 Distinguish between business ethics and the social responsibility of business. Page 15 What business managers should do when their decisions have impacts on a wide assortment of stakeholders is not altogether clear. Ethical conversation is less about finding the one and only right thing to do than it is about finding the better thing to do. Whatever you choose to do, some stakeholders will be hurt and others will benefit. Business ethics requires a thought process that weighs the benefits of a decision compared to its harm, consideration of the duties we owe other human beings, the characteristics possessed by a virtuous person, and the care we have for the well-being of those affected by business decisions. Understanding what business ethics is and is not expands our appreciation for the difficulties involved when a firm is trying to earn a large profit and at the same time genuinely attempting to be a reliable corporate citizen. The temptation to treat customers as an instrument for the enrichment of the business can be seductive. Resisting that temptation requires business leadership that treats customers, employees, and the community with the same respect naturally assigned to owners of the firm. One useful distinction

identifying the boundaries of ethics is that between ethics and morals. The latter consists of the performance expectations a culture has at any time for business behavior. For example, some cultures see bribes as an ordinary and acceptable lubricant for transactions. The morality of a firm in such a culture includes the assumption that bribes will be a normal occurrence as part of ordinary business interactions. Ethics is a more complicated set of expectations because it refers to reflection about what morals should be. In the illustration above, ethics would involve a conversation about and determination of optimal firm behavior. Who is harmed by those bribes? What is the effect on future generations of a morality tolerant of bribes? To what extent do bribes limit business opportunities in that the capability to pay bribes resides overwhelmingly in the hands of those who have already been financially successful? To think about the ethics of a decision requires us to have a language that accelerates consideration of what is good and right. A central objective of this chapter is to make you aware of the ideas and words we use when we tackle an ethical dilemma. This chapter provides some assistance for thinking systematically about issues of right and wrong in business conduct. Initially, we need to sort through the meaning of key terms like business ethics and social responsibility. Then, because it is helpful to have a useful approach to ethical decision making, we provide a practical method by which future business managers can think more carefully about the ethical dilemmas they will face during their careers. A business has a huge assortment of responsibilities. Each responsibility involves a relationship with other people in the community. Some of the responsibilities are more obvious than others. Firms have a responsibility to devote their energies to fulfilling the interests of their owners, certainly. The pursuit of profits is both a stimulus for incredible innovation and efficiency and a temptation to use whatever power the firm has to conceal information from consumers and the public. In addition, business firms owe safe working conditions to the employees who make it possible for the firm to thrive. Increasing the safety of the workplace can diminish profits, at least in the short run. Business ethics is full of dilemmas such as the extent to which short-term profits can be achieved at the cost of reduced safety for employees. Other responsibilities are just as real but perhaps less obvious. A business firm must obey the laws in the countries where it offers its products and services. This course spells out many of those responsibilities, and the list is quite extensive. In addition, firms have a much more abstract ethical responsibility to obey the standards of conduct consistent with prevailing ethics and expectations in the communities where they practice their trade. Ethics is the study and practice of decisions about what is good or right.

Ethics guides us when we are wondering what we should be doing in a particular situation. Business ethics is the application of ethics to the special problems and opportunities businesspeople experience. An ethical dilemma is a problem about what a firm should do, for which no clear, right decision is available. Reasonable people can expect to disagree about optimal solutions to ethical dilemmas. Closely related to ethical dilemmas arising in business situations is the concept of the social responsibility of a business. The social responsibility of business consists of the expectations the community imposes on firms doing business within its borders. These moral expectations must be honored to a certain extent, even when a firm wishes to ignore them, because firms are always subject to the implicit threat that legislation will impose social obligations on them. So, if the community expects businesses to obey certain standards of fairness even when the standards interfere with profit maximization, firms that choose to ignore this expectation do so at their peril. The analogy here is to the role of a good citizen. The community guarantees you certain protections and rights. In return for that support network, we owe responsibilities of civic engagement and obedience to the law. A business firm gets the protection of laws designed to provide stability and productivity in their activities. Its social responsibilities extend to the expectations the community has for how a business should behave. The definition of business ethics refers to standards of business conduct. It does not result in a set of correct decisions. Business ethics can improve business decisions by serving as a reminder not to simply choose the first business option that comes to mind or the one that enriches the firm in the short run. But business ethics can never produce a list of correct business decisions that all ethical businesses will make. Page 16 Exhibit 2-1 provides a picture of the broad scope of business ethics. Many decisions made by managers and entrepreneurs affect a huge array of people inside and outside the walls of the business. Those effects raise issues of what is right, fair, and acceptable. Consequently, business ethics is an essential part of business planning and strategy. Exhibit 2-1Business Ethics Issues Take Many Forms

Business Law and Business Ethics LO 2-2 Recognize the relationship between business law and business ethics. Before business managers consider the social responsibilities of firms in their communities, they need to gather all the relevant facts. Experienced managers know that assembling the facts is

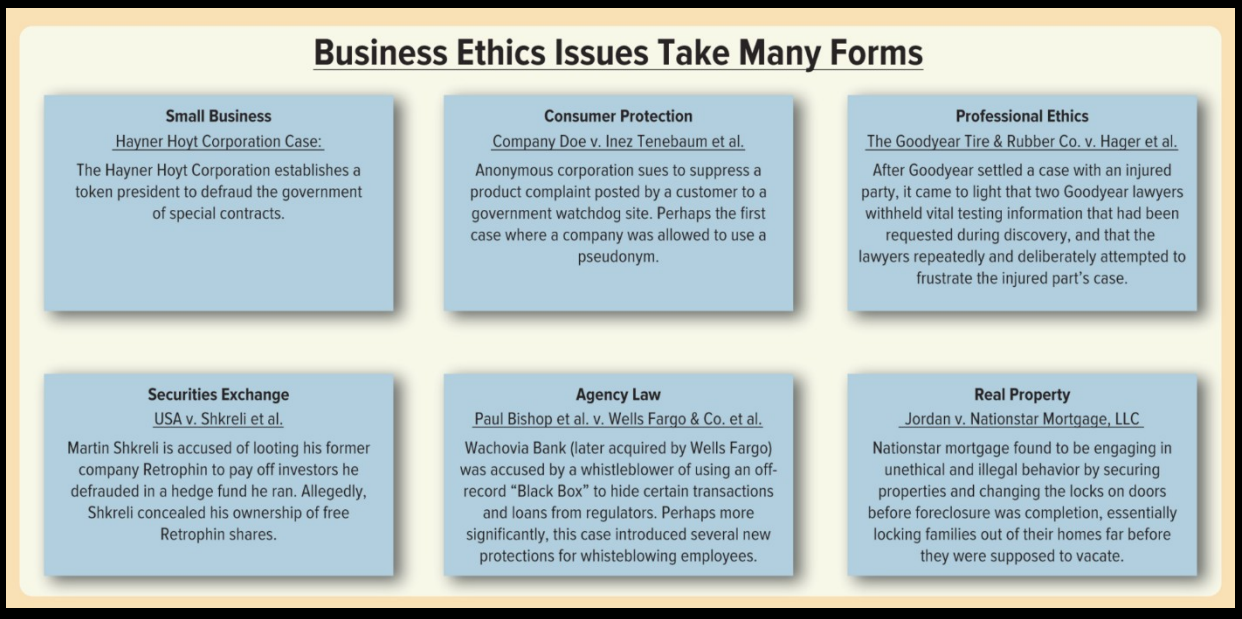
just the beginning of a thoughtful business decision. Next, it makes sense to ask, Is it legal to go forward with this decision? The legality of the decision is the minimal standard that must be met. But the existence of that minimum standard is essential for the development of business ethics. Think of the law as the most recent consensus about the lower level of business ethics. We can expect that minimum to evolve alongside new technologies, emerging demographic patterns, and continuing growth in our empathy for marginalized voices in our country. To make this point, let’s take a look at the growing practice of bribery in the absence of legal standards. In some countries, businesses must pay bribes to receive legitimate supplies. Although the businessperson may be morally opposed to paying the bribes, the supplies are necessary to stay in business, and there may be no other means of obtaining them. Thus, foreign companies face an ethical dilemma: they must decide whether to pay bribes or find alternative sources of supplies. For instance, when McDonald’s opened its doors in Moscow, it made arrangements to receive its supplies from foreign providers. These arrangements ensured that the franchise did not have to engage in questionable business practices. Page 17Page 18 At the same time that business ethics guides decisions within firms, ethics helps guide the law. Law and business ethics serve as an interactive system—informing and assessing each other. For example, our ethical inclination to encourage trust, dependability, and efficiency in market exchanges shapes many of our business laws. The principles of contract law, for instance, facilitate market exchanges and trade because the parties to an exchange can count on the enforceability of agreements. Legal rules that govern the exchange have been shaped in large part by our sense of commercial ethics. At this point it might be helpful to get a stronger sense of the range of ethical and unethical business behavior by studying the chart in Exhibit 2-2. Exhibit 2-2Examples of Unethical and Ethical Business Executives and Businesses The Complexity of Business Ethics: The Story of Two Biotech Ceos Elizabeth Holmes is a 37-year-old billionaire whose company, Theranos, claimed to be developing a technique for doing medical diagnostic work with the draw of a single drop of blood. The objective is to create a low-priced, less painful alternative to the large blood draws that have been the traditional way to do medical diagnoses. Holmes claimed to be designing and producing a product that is so cheap that a person can get a cholesterol test for the price of an egg McMuffin. She proudly says that she will not raise prices and will not deny access to this new technology to people in need. Yet, in an investigative report in the fall of 2015, The Wall Street Journal revealed that Theranos was doing some medical diagnostic work using standard blood drawing

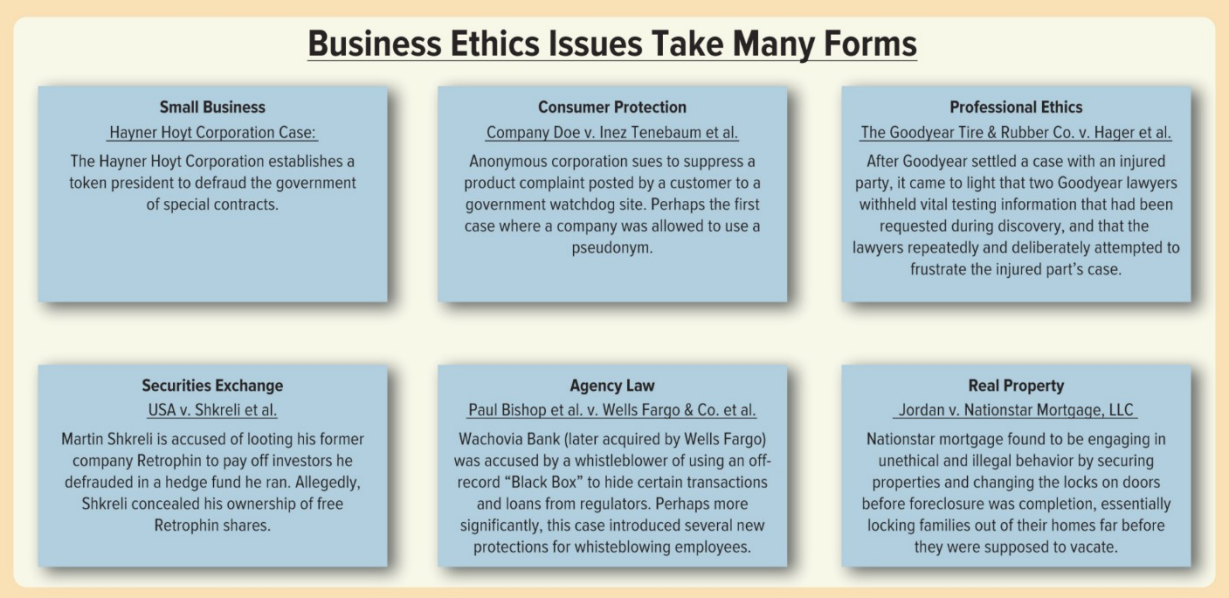
technology rather than their own highly touted techniques. In addition, the FDA announced that the Theranos innovation had not been adequately peer reviewed and was not an approved blood collection device. In January 2022, Holmes was convicted of four counts of fraud. Martin Shkreli is the founder and CEO of Turning Pharmaceuticals. He is a year older than Ms. Holmes and has an estimated wealth of $100 million. He acquired the drug Daraprim, which is used by HIV and cancer patients, and promptly raised the price from $13.50 to $750. In interviews, he explained that he probably should have raised the price even more because those who needed the drug would be willing to pay even more because it was so valuable for their health. Daraprim costs approximately $1 to make. Turning gives away 60% of Daraprim to those who do not have the money to pay for it. Shkreli points out that his primary responsibility is to make profits for those who own Turning. On December 17, 2015, Shkreli was arrested on charges of securities fraud for allegedly using assets from a biotech company he started to pay off unrelated business debts. Page 19 Of course, different ethical understandings prevail in different countries. Thus, ethical conceptions shape business law and business relationships uniquely in each country. Increasingly, business leaders require sensitivity to the differences in legal guidelines in the various countries in which they operate. These differences are based on somewhat different understandings of ethical behavior among business people in diverse countries. As we mentioned earlier, business ethics does not yield one correct decision. So how are business managers to chart their way through the ethical decision-making process? Consider the careers of two young entrepreneurs in Silicon Valley as additional insights into the complexity and necessity of business ethics. Are they ethical models? What more would you have to know about each of them before deciding whether future business leaders should try to follow their examples? BUSINESS Ethics Flashpoint 2.1 Chevron in Ecuador In 1964, Texaco Petroleum (now known as Chevron), along with Gulf Oil Corporation (Gulf), was invited by the Ecuadoran government to conduct exploratory activities in the eastern region of Ecuador. This region was known as the Oriente. In 1967, Texaco and Gulf discovered large quantities of oil in the Oriente. After building a pipeline that would allow for the transfer of oil to the Pacific coast, Texaco began exporting the oil. Texaco acted as the operator in a partnership, known as a consortium, between Texaco and Gulf. In 1973, production reached 200,000 barrels of oil per day. During this period, Ecuador’s gross national product (GNP) had doubled. During the early 1970s, the military seized control of the Ecuadoran government. This takeover resulted in a series of governmental reforms that limited the size of

concession areas granted to foreign oil companies such as Texaco. Texaco, therefore, relinquished some of its concessions to Ecuador's state-run oil company, Petroecuador. In addition, Petroecuador joined the consortium between Texaco and Gulf. Soon after Petroecuador joined the consortium, Gulf left. The consortium, now consisting of only Texaco and Petroecuador, lasted from 1977 until 1990. In 1992, Ecuador did not renew Texaco's concessions. As a consequence, Texaco's interest in the oil industry came to an end. During the period in which it operated in Ecuador, Texaco's oil-related operations exacted a great toll on the residents of the Oriente. For example, Texaco dumped billions of gallons of toxic wastewater into surrounding rivers and streams of the Amazon. Texaco is also reported to have spilled about 17 million gallons of crude oil into surrounding lands in the Oriente. Another source reports that about 2.5 million acres of land were affected by the leaking of oil into soil and groundwater, as well as by oil discharges into wetlands, streams, and rivers. In addition, Texaco had allegedly stored toxic chemicals in hundreds of unlined pits. The waters that indigenous groups relied on for drinking, cooking, bathing, and fishing became receptacles for Texaco's garbage. Another source of environmental damage in the Oriente region was gas flaring and the burning of crude oil. These acts resulted in toxic fumes that polluted the air. The contaminated water and polluted air in the region of the Oriente had significant effects on the health of the residents living in the Oriente. A little more than 8,000 residents suffered one or more diseases attributable to the contaminants with which Texaco polluted the area. The people of the Oriente reported higher rates of cancer than the general population of Ecuador and in other Amazonian provinces. Birth defects were also attributed to the environmental pollution. However, despite these adverse effects on the surrounding population, Texaco did not endeavor to address these problems during its operations. In addition to suffering from diseases related to toxic contaminants, the indigenous population in the Oriente suffered economic losses. For example, 75 percent of Oriente residents reported that they had suffered from loss of their crops as well as loss of animals on which they relied because of Texaco's toxic discharges into the environment. Texaco's clearing substantial parts of natural habitat to make room for oil operations also contributed to the elimination of the region's forests. Thus, the contamination of the natural habitat in the Oriente led not only to disease but also to economic and cultural losses. In 1993, 46 residents of Ecuador who belonged to numerous indigenous tribes in the Oriente filed a suit against Texaco (now known as Chevron due to a merger) seeking redress for Texaco's actions. Texaco denied allegations of a causal connection between

its oil operations and the diseases reported. Additionally, Chevron endeavored to exclude Ecuador from trade negotiations with the United States until Ecuador shut down the lawsuit. To this action, then-Senators Barack Obama and Patrick Leahy responded: “While we are not prejudging the outcome of the case, we do believe the 30,000 indigenous residents of Ecuador deserve their day in court . . .” After numerous proceedings that began in New York and then moved to Ecuador, the plaintiffs were awarded $19 billion in damages—later reduced to $9.5 billion—in February 2011, for purposes of restoring the environment, providing health care treatment, and obtaining clean water. However, Chevron refused to pay this fine. On March 4, 2014, a U.S. federal judge blocked U.S. courts from being used to collect the $9.5 billion judgment against Chevron. The U.S. court concluded that the Ecuadoran courts had been influenced by corrupt relations between judges and attorneys representing the indigenous groups. As a consequence, Chevron’s fine was essentially revoked. Sources: Trudie Styler, “Seeking Justice in Ecuador,” March 5, 2014, HuffingtonPost.com; Lucien J. Dhooge, Aguinda v. ChevronTexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States, 19 J. of Transnational Law & Policy 1 (2009). Ethical Failures Can Be Bad for Business As the box above suggests, business behavior that might look attractive for profits can be a nightmare for a firm and the business leaders involved in making the decisions that led to the questionable behavior. For example, in 2016 a report documented that Wells Fargo employees had opened more than 2 million accounts for customers without their permission, and often applied fees and other charges to these extra accounts without the customers knowing. An investigation revealed that Wells Fargo employees were under extreme pressure from the company to meet certain sales quotas, and often the only way to meet these quotas was to fraudulently open extra accounts. Wells Fargo was required to return $2.6 million to consumers and, due to the severity of Wells Fargo’s wrongdoing, the Consumer Financial Protection Bureau (CFPB) ordered Wells Fargo to pay the largest fine the CFPB has ever imposed, $185 million. In addition, Wells Fargo CEO John Stumpf stepped down from his position as a result of the scandal. Perhaps what is most interesting about this case, however, is the scope of the reaction that it inspired. Not only did the CFPB order an enormous fine, but several U.S. cities, including Seattle, Chicago, and Sacramento, largely or entirely divested their funds from Wells Fargo accounts in protest over the scandal. This largely unprecedented move may represent a growing demand for business accountability and transparency, among public and private consumers alike. Page 20 Another well-known 2016 business ethics case

involved the drug company Mylan and its EpiPen product. An EpiPen is a pocket-sized device used for the self-injection of epinephrine, an antidote for anaphylactic shock brought on by allergy reactions. Having access to an EpiPen can truly be a matter of life or death for someone prone to extreme allergic reactions. Thus, when Mylan suddenly increased the price of an EpiPen by 500 percent, making the price of each EpiPen pack $600, there was a strong outcry from consumers, especially considering that generic alternatives to the device were practically nonexistent. Several state attorneys general launched fraud and antitrust investigations, and the House Oversight Committee got involved as well, in the form of a hearing with Mylan's CEO. The bad publicity sank Mylan's stock, and Mylan eventually reduced the price of the EpiPen (although the price remains relatively high compared to the original price). What is your reaction to Chevron's behavior in Ecuador? How do we begin to think about what is right and wrong in a situation like this one? The starting point in wrestling with dilemmas about what is right and good is the idea of values.


Business Ethics Issues Take Many Forms
Small Business
Hayner Hoyt Corporation Case:
The Hayner Hoyt Corporation establishes a token president to defraud the government of special contracts.
Consumer Protection
Company Doe v. Inez Tenebaum et al.
Anonymous corporation sues to suppress a product complaint posted by a customer to a government watchdog site. Perhaps the first case where a company was allowed to use a pseudonym.
Professional Ethics
The Goodyear Tire & Rubber Co. v. Hager et al.
After Goodyear settled a case with an injured party, it came to light that two Goodyear lawyers withheld vital testing information that had been requested during discovery, and that the lawyers repeatedly and deliberately attempted to frustrate the injured part's case.
Securities Exchange
USA v. Shkreli et al.
Martin Shkreli is accused of looting his former company Retrophin to pay off investors he defrauded in a hedge fund he ran. Allegedly, Shkreli concealed his ownership of free Retrophin shares.
Agency Law
Paul Bishop et al. v. Wells Fargo & Co. et al.
Wachovia Bank (later acquired by Wells Fargo) was accused by a whistleblower of using an off-record "Black Box" to hide certain transactions and loans from regulators. Perhaps more significantly, this case introduced several new protections for whisteblowing employees.
Real Property
Jordan v. Nationstar Mortgage, LLC
Nationstar mortgage found to be engaging in unethical and illegal behavior by securing properties and changing the locks on doors before foreclosure was completion, essentially locking families out of their homes far before they were supposed to vacate.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What Are Values? LO 2-3 Define values. When we think about the ultimate reason or purpose for which we make decisions in a business firm, we turn to the basic unit of business ethics—values. Values are positive abstractions that capture our sense of what is good or desirable. They are ideas that underlie conversations about business ethics. We derive our ethics from the interplay of values. Values represent our understanding of the purposes we will fulfill by making particular decisions. For example, we value honesty. We want to live in communities where the trust we associate with honesty prevails in our negotiations with one another. Business depends on the maintenance of a high degree of trust. No contract can protect us completely against every possible contingency. So we need some element of trust in one another when we buy and sell. Take a look at American Express's core values listed in Exhibit 2-3. Think about how each abstraction would play out through the business's behavior. Exhibit 2-3American Express's Core Values AMERICAN EXPRESS'S CORE VALUES Customer Commitment Quality Integrity Teamwork Respect for People Good Citizenship A Will to Win Personal Accountability If we think about the definition of values for a moment, we realize two things. First, a huge number of values pull and push our decisions. Second, to state that a value is important in a particular situation is to start a conversation about what is meant by that particular value. To return to the Chevron case, when someone says we wanted to maximize efficiency, environmental sustainability, or justice, we are only slightly closer to any understanding of the complexity of the dilemma. Sometimes a firm's core values seem less ambiguous, but they still leave a lot of ambiguity and

flexibility for business decision making. See Adidas’s core values in Exhibit 2-4 as an example. Exhibit 2-4Adidas’s Core Values ADIDAS’S CORE VALUES We are committed to continuously strengthening our brands and products to improve our competitive position. We are consumer-focused and therefore we continuously improve the quality, look, feel and image of our products and our organizational structures to match and exceed consumer expectations and to provide them with the highest value. We are innovation and design leaders who seek to help athletes of all skill levels achieve peak performance with every product we bring to market. We are dedicated to consistently delivering outstanding financial results. We are a global organization that is socially and environmentally responsible, that embraces creativity and diversity and is financially rewarding for our employees and shareholders. Page 21 Sometimes, staying true to a company’s values can mean making decisions that do not necessarily seem good for business. For example, the pharmacy chain CVS considers itself in the business of health care and prides itself on “helping people on their path to better health.” However, CVS also sold cigarettes—a product long known to cause serious health problems. So, in 2014, CVS’s CEO Larry Merlo made the tough decision to stop selling cigarettes at every single CVS location across the nation. Merlo knew that this decision could have substantial costs for CVS as smokers took their business elsewhere, but he stated that “[e]nding the sale of cigarettes and tobacco products at CVS Pharmacy is simply the right thing to do for the good of our customers and our company.” By making this move, CVS also firmly established its dedication to health in the minds of its customers. Balancing values and profits is never easy, but it can be integral to running a successful business.

How Do Values Provide a Starting Point for Thinking about Business Ethics? LO 2-4 Explain how values provide a starting point for thinking about business ethics. To help make WH useful to you as a manager, Exhibit 2-5 makes clear the central role of clarifying what version of a value one feels loyalty toward. Without that clarification, we lose sight of why something is said to be good or right. The exhibit identifies four of the most important values influencing business ethics and presents alternative meanings for each. This table should not only help clarify the importance of values in your own mind but also enable you to question others who claim to be acting ethically. For instance, a manager might be deciding whether to fire an employee whose performance is less than impressive. In making the decision, the manager explores alternative visions of key values such as

justice and efficiency and then makes choices about which action to take. Values and their alternative meanings are the foundation for different ethical decisions. Exhibit 2-5Primary Values and Business Ethics VALUE ALTERNATIVE MEANINGS Freedom To act without restriction from rules imposed by others To possess the capacity or resources to act as one wishes To escape the cares and demands of this world entirely Security To possess a large-enough supply of goods and services to meet basic needs To be safe from those wishing to interfere with your property rights To achieve the psychological condition of self-confidence to such an extent that risks are welcome Justice To receive the products of your labor To treat all humans identically, regardless of race, class, gender, age, and sexual preference To provide resources in proportion to need To possess anything that someone else is willing to grant you Efficiency To maximize the amount of wealth in society To get the most from a particular output To minimize costs Page 22 Where do our value priorities come from? That question is another way of asking: At the foundational level, what causes us to place a higher weight on decisions that reflect some values rather than others? BUSINESS Ethics Flashpoint 2.2 Dole Food Company and Its Workers Dole Food Company (Dole) dominates the market for bananas, holding a 25 percent share in the world market. The majority of bananas from Dole come from Latin America. Specifically, Dole operates banana plantations in several Latin American countries, including Ecuador, Nicaragua, Costa Rica, Guatemala, Honduras, and Panama. An important step in the process of growing bananas is the application of pesticides to prevent disease and pathogens. Fumazone was among the most toxic pesticides used in banana cultivation during the 1960s through the 1980s. The main ingredient in Fumazone is dibromochloropropane (DBCP). DBCP is known to have harmful effects on male reproductive organs and sperm counts. However, despite knowledge of this danger, the U.S. government approved its use on farms in 1964. During a brief period after 1964, about 60 workers in California that manufactured Fumazone were found to be sterile. As a consequence, in 1979, the U.S. Environmental Protection Agency banned the use of DBCP in the United States. However, Dole continued using DBCP in its Latin American plantations well into the mid-1980s. Dole admitted to knowing that DBCP could harm the workers but chose not to inform its workers in Latin America. As a consequence of Dole’s use of DBCP on its plantations, the health of Latin American plantation workers was threatened. DBCP posed a health hazard to plantation workers in that it was known to cause male sterility as well as genetic disorders in the children of men and women exposed to DBCP. In fact, the National Institutes of Health claims that DBCP is toxic, carcinogenic, and mutagenic. Further, the

State of California’s Safe Drinking Water and Toxic Enforcement Act of 1986 concluded that DBCP caused reproductive and developmental harm. Although the toxicity of DBCP was well-known, banana plantation workers were reportedly not given equipment or training to minimize exposure to the harmful chemical. Unfortunately, the task of applying DBCP on banana plants fell to the most marginalized of workers because few workers desired to risk exposure to DBCP. Another problem with DBCP is that it negatively affected the environment. For example, the application of Fumazone to banana roots caused DBCP to seep into the groundwater. This contamination of the environment killed organisms living in the surrounding habitat, including fish, mammals, and plants. In 2004, a small breakthrough was made. Twelve banana plantation workers filed a suit against Dole in a California court. Six of these workers were found to have been made sterile due to the poor working conditions of Dole’s banana plantations. During these proceedings, evidence was presented showing that Dole knew that DBCP could harm the workers and nevertheless insisted on using DBCP. In addition, Dole had ignored safety recommendations by the manufacturer of the pesticide Fumazone. On November 5, 2007, the suit filed by the 12 workers resulted in Dole being ordered to pay damages to 6 of the 12 workers. Specifically, the Los Angeles Superior Court awarded the plantation workers $3.3 million in damages. On November 15, 2007, a jury ordered Dole also to pay $2.5 million in punitive damages to five of the workers—that is, damages paid in excess of the plaintiffs’ proved injuries. Later, however, a judge vacated the punitive damages and lowered the actual damages of $3.3 million to $1.58 million. As a result of the use of DBCP on banana plantations, thousands of banana pickers have filed suits against produce companies, such as Dole Food Co., Chiquita Brands International Inc., and Fresh Del Monte Produce Inc., and chemical companies, such as Dow Chemical Company and Shell Chemical Company. However, thousands of workers continue to suffer from their work in the banana industry in Latin America. In addition, many of the banana workers are children; roughly 70 percent of these children work on Dole plantations, according to a Human Rights Watch report. Sources: Armin Rosencranz, Stephen Roblin, and Nicole Balloffet, “Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts,” 3 Golden Gate U. Envtl. L.J.161 (2009); Human Rights Watch, “Ecuador: Widespread Labor Abuse on Banana Plantations,” April 25, 2002, HRW.org. Value priorities can stem from many sources. Tradition, family, culture, reasoning about the consequences of alternative choices, and a sense of duty or obligation can all fuel the value priorities we bring to an ethical dilemma. Page 23 For many people, their

preeminent values derive from religious teachings. For example, Catholic social doctrine teaches that the moral quality of a society depends on how it treats its most vulnerable members. Similarly, the United Methodist Church in its 2009–2012 Social Principles document pledges Methodists “to support the poor and challenge the rich.” Try to express the struggle between Dole and its workers as a struggle between two sets of values rather than simply a contest between people in white hats and villains in black hats. If you can, you will be more fair in your assessment of Dole’s behavior. To be fair is not to condone but, rather, to be open to understanding the logic and purposes of all the relevant players in the ethical flashpoint. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Business Ethics and Swedish Advertising Law Recall from the WH approach to ethical decision making that when businesses make decisions, they should consider all the relevant stakeholders. One relevant stakeholder is the customer, or consumer. In Sweden, consumers are assumed to be vulnerable in the marketplace; therefore, protecting the consumer is considered the job of the government. Unlike in the United States, in Sweden public policy acknowledges that “there exist large groups of consumers who, owing to low incomes, deficient education and knowledge of the market, etc., are less well equipped than the average citizen for their role as consumers.” One group of consumers less equipped than the average citizen in Sweden is children. The government considers children extra vulnerable and impressionable and thus in need of even more protection than the average consumer. Swedish laws ban all television advertising targeting children below the age of 12. The ban includes not only toy advertisements but also commercials for foods high in fat and sugar, such as sweets and fast food. Advertisements for such products can be aired if the targets of the advertisements are not children. For example, commercials for toys, sweets, and foods high in fat may be aired if they are designed to attract and inform adults as opposed to children. What may surprise many Americans is that almost 90 percent of Swedish advertising professionals are in favor of the ban on advertising to children because they recognize that such advertising is misleading since children do not understand the commercial nature and purpose of advertising.

The WH Framework for Business Ethics LO 2-5 Analyze business decisions using the WH framework. A useful set of ethical guidelines requires the recognition that managerial decisions must meet the following primary criteria (Exhibit 2-6): The decisions affect particular groups of stakeholders in

the operations of the firm. The pertinent question is, thus, whom would this decision affect? The decisions must meet the standards of action-oriented business behavior. Managers need a doable set of guidelines for how to make ethical decisions. Exhibit 2-6The WH Process of Ethical Decision Making W—WHO (Stakeholders) Customers Owners or shareholders Management Employees Community Future generations H—HOW (Guidelines) Public disclosure Universalization Golden rule Who are the Relevant Stakeholders? The stakeholders of a firm are the many groups of people affected by the firm's decisions. Any given managerial decision affects, in varying degrees, the following stakeholders: Customers. Owners or shareholders. Management. Employees. The general community where the firm operates. Future generations. Managers should make sure they consider all relevant stakeholders when they engage in ethical reasoning. Study Business Ethics Flashpoint 2.3. First, identify the stakeholders directly affected by the behavior of WorldCom and then tackle the harder task of identifying the many stakeholders who are in the background, perhaps, but were nevertheless affected immensely by WorldCom's actions. Page 24 BUSINESS Ethics Flashpoint 2.3 The WorldCom Accounting Scandal WorldCom Inc. was a telecommunications company that began operating in the state of Mississippi in the 1980s. In 1989, WorldCom became a publicly traded corporation; that is, it began selling shares of its company to investors. In the 1990s, WorldCom became the second largest U.S. long-distance telephone service carrier. In addition, it was a leading operator of Internet services and placed forty-second among the Fortune 500 companies in 2001. As the 1990s came to an end, telecommunications was expanding and becoming more competitive. Numerous telecommunications companies entered the long-distance communications market, including the local telephone companies and the Regional Bell Operating Companies, and many companies entered the market for Internet services. Eventually, the supply of telecommunications services outgrew the demand for those services, and the industry experienced a recession—that is, a drop in economic activity. WorldCom's revenue began to fall. During this time, WorldCom used fraudulent accounting methods that allowed it to overstate its financial status to its shareholders. Specifically, CEO Bernard Ebbers presented a false picture of WorldCom's net worth, informing the Board of Directors of WorldCom that the company would continue growing vigorously. However, Ebbers knew that his projections were inconsistent with WorldCom's declining position. One reason for boosting the reported revenues of WorldCom was to increase shareholder confidence. In other words, the logic behind Ebbers' fraudulent accounting methods was that if he could deceive

shareholders into believing that WorldCom was growing, shareholders would continue to inject money into the company. The fraud at WorldCom was propagated not just by Ebbers but also by several other officials, including CFO Scott Sullivan and WorldCom's comptroller, David Myers. Both of these individuals aided in secretly making entries of hundreds of millions of dollars into WorldCom's accounting report without any basis for such entries. The fraud committed by the executive officials at WorldCom resulted in overstating the company's income by $11 billion. In 2005, Ebbers was found guilty in federal court of fraud and received a sentence of 25 years in prison. Scott Sullivan received five years in prison, pleading guilty to fraud, conspiracy, and making false financial statements. David Myers received a sentence of one year and one day in prison. As a result of the accounting fraud that occurred in the early 2000s, WorldCom was forced to declare bankruptcy. When this occurred, thousands of workers at WorldCom lost their jobs, and shareholders lost billions of dollars as the worth of WorldCom plummeted. WorldCom not only affected its workers and shareholders but the entire telecommunications industry. Specifically, competing telecommunications companies that had once trusted WorldCom's false accounting reports now realized that they had been duped into relying on false data when making business decisions. Sources: Dennis R. Beresford, Nicholas deB. Katzenbach, and C. B. Rogers, "Report of Investigation by the Special Investigative Committee of the Board of Directors of Worldcom, Inc." (March 31, 2003), FindLaw.com; Jennifer Bayot and Roben Farzad, "Ex-WorldCom Officer Sentenced to 5 Years in Accounting," August 12, 2005, NYTimes.com. Page 25 E-Commerce and the Law Technological Records and Ethics Journalists use different technological media to contact and store information about confidential sources, including government whistleblowers. One of the most important parts of journalism is to protect confidential informants so that news sources can still enlighten the public with important and sensitive information. Ethical issues arise from this challenge. Documents containing information about informants' identities may not be collected by the government without permission from the Deputy Attorney General. In other words, the First Amendment protects the privacy and individual ownership of these email and phone records. For example, in 2004, the Federal Bureau of Investigation (FBI) illegally obtained phone records related to the confidential informants of The New York Times' and Washington Post's bureaus in Indonesia. The executive editors of both newspapers were called by the FBI, and both received apologies. The Justice Department looked into the illegal investigation by the FBI after the FBI went ahead with what it called "emergency" gathering of private information

related to an alleged terrorist investigation. The editors were never told why their records were needed. Now, news corporations are putting numerous security barriers and encryptions around their records so that nobody could have access to them even if they tried. In fact, Wikileaks, the website that publicizes secret government documents, has probably the strongest security procedures protecting its sources. Instant messages are expertly encrypted, as are all files passed between people. A tool that enables users to communicate completely anonymously, the Tor Project, completely hides all servers. Other news companies are attempting to mimic such standards and adjust privacy policies to reserve the right not to release any information about a source "to law enforcement authorities or to a requesting third party without notice." Some of the more perplexing ethical dilemmas have emerged as a result of our increasing dependence on e-commerce. CASE Nugget Tyson Foods' Bribery Charges In 2004, memos containing information regarding illegal bribes were sent from a Tyson Foods plant manager in Mexico to corporate officials in the United States. Basically, company officials in Mexico were sending roughly $2,700 a month to the wives of two veterinarians involved in safety and quality of the food produced at the plant. At the time, Tyson Foods was attempting to increase its national export. However, countries involved in the importation of these products require experts to certify that these food products meet certain safety and sanitary standards. Essentially, the two veterinarians were being sent extra payments so that they would sign off on the quality of the products produced at the plant regardless of whether the products were actually up to par with the standards imposed. This act is especially dangerous considering the reputation poultry products have of passing on disease, including salmonella, to consumers. The company officials in Arkansas, including the president of Tyson International and vice president of operations, realized that bribing foreign officials, the biggest issue at hand, was a felony according to the Foreign Corrupt Policies Act. Faced with the option of investigating the allegations and bringing the illegal activities to light, the company officials instead found a way to keep sending the bribes but make the payments look legal. Two years later, Tyson officials finally hired a law firm to do an internal investigation of the bribery. In 2011, Tyson was charged with conspiracy and violating the Foreign Corrupt Practices Act. To avoid trial, Tyson was forced to pay $4 million as a criminal penalty and $1.2 million to the Securities Exchange Commission for the charge of maintaining illegal records. BUSINESS Ethics Flashpoint 2.4 The Health Focus of Revolution Foods Revolution Foods started as a small business venture in Oakland, California. The start-up's objective is to provide healthy prepackaged lunch meals for

children. Currently, the market for prepackaged lunch meals is dominated by Kraft Foods. Kraft Foods sales of Lunchables account for approximately 76 percent of sales in the prepackaged lunch market niche. Kids love Lunchables because these meals allow them to create their own food. Simply, these meals are fun. Parents also benefit from Lunchables in the sense that these meals require no preparation. However, Lunchables are not necessarily healthy. According to food critics, including the founders of Revolution Foods, Lunchables contain an excess of fat, sugar, salt, and preservatives that are unhealthy. For example, Kraft previously had a Maxed Out line of Lunchables that was considered one of the Five Worst Packaged Lunchbox Meals by the Cancer Project. Kraft eventually stopped producing this line of Lunchables—with a whopping 660 calories and 22 grams of fat—and endeavored to create more healthy meals. In response to the apparent need for more nutritious lunch kits, Revolution Foods claims to offer a healthy alternative. Kristin Richmond, one of the founders of Revolution Foods, believes that the objective of Revolution Foods is to provide higher-quality ingredients to cultivate healthier lifestyles. Making foods with real meat, real cheese, and other recognizable ingredients appears to be the driving force behind the company. In other words, rather than focusing solely on profits, Revolution Foods attempts to focus on what will also help the consumer lead a healthier lifestyle. One example of the types of prepackaged lunch kits that Revolution Foods offer is the Ham and Cheddar Meal Kit, consisting of ham from animals raised with no antibiotics. This lunch kit also has no preservatives, no high-fructose corn syrup (a commonly used artificial sweetener), and no artificial coloring. On average, Revolution Foods' Meal Kits are lower in fat, salt, and sugar than Kraft's Lunchables. The director of nutrition policy at the Center for Science in the Public Interest has claimed that Revolution Foods, although not necessarily healthy, is nutritionally improved. The fact that Revolution Foods provides foods that are locally grown, natural, and organic without preservatives appeals to those consumers who desire to cultivate healthy dietary habits. Revolution Foods' Meal Kits can now be found in more than 1,000 stores, including Kroger's, Target, and Whole Foods. Sources: Stephanie Strom, "Lunchables, The Lunchbox King, Faces a Rival Vowing Higher-Quality Fare," N.Y. Times, August 21, 2013; Marc Gunther, "Revolution Foods: a healthier competitor to Lunchables," March 11, 2014, The Guardian.com. How Do We Make Ethical Decisions? Making ethical decisions has always been one of our most confusing and important human challenges. In the process of meeting this challenge, we have discovered a few general ethical guidelines to assist us. An ethical guideline provides one path to ethical conduct. Notice that all

three of the ethical guidelines (the golden rule, public disclosure test, and the universalization test) reflect a central principle of business ethics: consideration of stakeholders.Page 26 The Golden Rule The idea that we should interact with other people in a manner consistent with the way we would like them to interact with us has deep historical roots. Both Confucius and Aristotle suggested versions of that guideline. One scholar has identified six ways the Golden Rule can be interpreted: Do to others as you want them to gratify you. Be considerate of others' feelings as you want them to be considerate of yours. Treat others as persons of rational dignity like you. Extend brotherly or sisterly love to others, as you would want them to do to you. Treat others according to moral insight, as you would have others treat you. Do to others as God wants you to do to them. Regardless of the version of the Golden Rule we use, this guideline urges us to be aware that other people—their rights and needs—matter. The focus on others that is the foundation of the Golden Rule is also clearly reflected in a second ethical guideline: the public disclosure test.Page 27 BUSINESS Ethics Flashpoint 2.5 The Dofasco Steel Company's Approach to Workers Dofasco is the second-largest steel producer in Canada and sells a wide range of steel products. In the 1980s, Dofasco experienced shrinking profits and decided to change its approach to business. One of the ways that Dofasco changed was in its approach to its workers. Specifically, Dofasco attempted to implement a philosophy taking into account the whole person at work. In other words, this approach sought to include wellness as an important characteristic of the employee experience. In line with this new philosophy, the Dofasco management claimed it would abide by the following policy statement issued in its 1996 guides of the company's health, safety, and lifestyle activities: "At Dofasco, there is nothing more important than the health and safety of our people." Consistent with this policy statement, Dofasco provided training for employees in problem solving, manufacturing processes, and customer service. Dofasco also built on its tradition of providing its workers with ergonomic and fitness resources as well as preventive medical services. Yet another way that Dofasco sought to focus its energies on employee needs was by encouraging healthy lifestyle practices at work. A healthy lifestyle at work would be achieved by preventing workplace accidents and maintaining a safe environment. In addition, Dofasco assessed employee needs in response to worker suggestions. Dofasco believes that its focus on a safe and healthy workplace has improved its business. Specifically, the company claims that its policies have reduced lost time associated with work injuries and minimized Workers Safety Insurance Board payments. In addition to focusing on worker safety and well-being, Dofasco also has a history of being

environmentally responsible. For example, Dofasco was the first corporation in Canada voluntarily to sign an Environmental Management Agreement with Environment Canada and Ontario's Ministry of the Environment. In this agreement, Dofasco made commitments to abide by specific air and water quality standards and sustainable energy use and waste management. Through this agreement, Dofasco expressed its commitment to the community. In addition, Dofasco created a Sustainable Development Strategy Team and is a founding sponsor of the Sustainable Enterprise Academy at York University's Schulich School of Business. The mission of this academy is to provide executives with training in how to manage businesses with an eye for sustainability. Dofasco's organizational practices resulted in being named one of the world's most sustainable companies in the Dow Jones Sustainability Group Index. Sources: Dan Corbett, "Excellence in Canada: Healthy Organizations—Achieve Results by Acting Responsibly," Journal of Business Ethics 55, no. 2 (December 2004), pp. 124, 130; Joan Enric Ricart, et. al. "The Sustainable Enterprise: Learning from DJSI Leaders", Fundacion BBVA (2005). Public Disclosure Test One way to think of the public disclosure test is to view it as a ray of sunlight that makes our actions visible rather than obscured. The public disclosure test is sometimes called the television test, for it requires us to imagine that our actions are being broadcast on national television. The premise behind this general guideline is that ethics is hard work, labor that we might resist if we did not have frequent reminders that we live in a community. Given our role as a member of a community, our self-concept is tied, at least in part, to how that community perceives us. Universalization Test A third general guideline shares with the other two a focus on the "other"—the stakeholders whom our actions affect. Before we act, the universalization test asks us to consider what the world would be like if our decision was copied by everyone else. Applying the universalization test causes us to wonder aloud: "Is what I am about to do the kind of action that, if others followed my example, makes the world a better place for me and those I love?" This chapter concludes with two Business Ethics Flashpoint examples: Flashpoints 2.4 and 2.5. For the first one, try to word what the firm did in terms of the ethical guidelines. Did its behavior show potential consistency with all three of the guidelines? As you study this next Business Ethics Flashpoint, start by asking yourself what values are in conflict in this business scenario. After you have established which values are in tension, work through both steps in the WH process for making ethical business decisions. In summary, business managers can apply the WH approach to most ethical dilemmas. The WH framework provides a practical

process suited to the frequently complex ethical dilemmas that business managers must address quickly in today’s society.

Point/Counterpoint Page 28 The Social Responsibility of Corporations Do a Firm’s Ethical Responsibilities Extend Beyond Maximization of Profits? YES NO Communities have dozens of needs that, when met, assist citizens in flourishing. What sense does it make to take an important sector like corporate America and deny them the opportunity to assist in meeting these needs? When a computer firm decides to enhance the educational mission of the town where they produce their product by giving computers to the school, they do so in an environment where schools are often pinched for funds. Those students need computers, and they would take them from anyone who is kind enough to provide them. Business firms are major citizens. They require utilities, roads, airports, police, sewage systems, power plants, and fire protection. These services impose heavy costs on the community. Firms, like other citizens, have a responsibility to assist in paying for these public services. Their tax payments certainly serve this purpose. But from the community’s perspective, should we not encourage citizens of all kinds to give back to their communities as often and as generously as they are willing to provide? Applauding the social responsibility of firms when they give back to their communities strengthens the ties of the firm to that community. A sense of mutual respect blooms between the corporation and the community where so many of its managers and workers have agreed to live. The basic purpose of a business firm is to provide a service or product to consumers that makes profits for its owners. Capitalist theory depends on the incentive of the profit motive as a guarantee that firms will meet the desires of consumers. Please those consumers, and the market is an outstanding institution. Displease them, and you go out of business. This sanitizing process relies on the assumption that firms will seek to maximize profits. When firms decide for themselves that they will have goals that conflict with profit maximization, they undercut the meaning and the benefits of capitalism. Democracies have a process for deciding which of the countless potential good deeds a community will pledge to do. Tax money is never bountiful enough to satisfy our human desire to assist one another. We must pick and choose which needs to meet and which to postpone for another day. But the point is that we make these decisions AS A COMMUNITY. When a corporation takes it upon itself to use money it earned by charging

consumers a price for a good or service, that firm is seizing the role of government BECAUSE IT CAN. No community has ceded the right to make social decisions to the corporation. Instead, the firm uses its powers to spend the community's money AS THE CORPORATION SEES FIT. This behavior is an affront to democracy and basically says to the community, "We know best what the community's priorities should be." If firms have so many excess profits that they can become a "good deeds" agency as well as a business firm, they should honor their true role and lower prices so more consumers can buy their products. By being what they claim is socially responsible, they are implicitly taxing their consumers who pay for a good or service AND then an extra fee for the firm to do what it designates as our top social priorities.

Questions & Problems Page 29 What ethical guidelines could help an American business manager working in another country decide whether she should engage in behavior that is ethical where she works but unethical in the United States? What is the relationship between business behavior that is legal and business decisions that are ethical? How do business ethics and business law interact with each other? How does the WH approach to ethics respond to an ethical problem? In 2000, Donald Stern incorporated a startup company named Grail in order to market a new and revolutionary chip design that Stern had invented. While witnesses expressed the view that Stern's innovation would be the "Holy Grail of memory technology," the company was unable to find investors, and by March, 2001, Grail had run out of money. On April 19, 2001, the following month, Stern met with Ryuichi Matsuo and Kazutoshi Hirayama, two representatives from Mitsubishi. Matsuo signed a nondisclosure agreement which required Mitsubishi "to keep in strict confidence and trust and not use, disclose or make available to others, including any of its affiliates or third parties any 'Proprietary Information' and 'Company Documents and Materials' (together 'INFORMATION') without the prior written consent of [Grail]." In the meeting, Stern showed Hirayama 16 items of proprietary information, including the core concept behind his miracle memory chip, of which Hirayama took extensive notes. Nothing came from the meeting between Grail and Mitsubishi. In 2003, Mitsubishi and Hitachi formed Renasas Technology in a joint venture. Hirayama was one of the employees transferred from Mitsubishi. Stern suspected that Renasas was using his innovations and that Mitsubishi had broken the NDA because of an article he read promoting Renasas' new technology. In the ensuing 2012 trial, expert witnesses found that "of the 16 items of confidential information disclosed to Mitsubishi, 11

had been implemented” in Renasas’ new technology. On May 16, 2012, the jury found that Mitsubishi had violated the NDA and determined damages to be $123,898,889. Mitsubishi has filed an appeal for a new trial to address the damages, which is ongoing now. How would Mitsubishi’s violation of the NDA affect the decisions of other innovative tech companies to approach potential investors? Which aspects of the WH process did Mitsubishi neglect in their decision to break the NDA? Source: Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc., 225 Cal. App. 4th 786 (2014). Tyco International, a manufacturing company, sued its former CEO, Dennis Kozlowski, in regard to his receipt of unauthorized bonuses from the company profits. Among his other wrongdoings, Kozlowski awarded unauthorized special bonuses to himself and more than 40 other Tyco employees. In sum, he misappropriated from company funds over $100 million that he was not authorized to receive. Included in this misappropriation was the use of company funds for personal expenditures, such as $18 million to buy and redecorate his New York City apartment and $1 million for his wife’s 40th birthday party, held on the Italian island of Sardinia. The extravagant party featured an ice sculpture of the statue of David urinating Stolichnaya vodka. Based on these and other corporate misdeeds in related criminal proceedings, Kozlowski is currently serving 8.33 to 25 years at the Mid-State Correctional Facility in New York. How do you think Kozlowski would have acted had he considered the public disclosure test before engaging in these corporate misdeeds? What if he applied the universalization test? Source: Tyco Intl, Ltd. v. Kozlowski, 2005 DNH 68; 2005 U.S. Dist. LEXIS 6867 (April 21, 2005). In Arkansas, methamphetamine (meth) was manufactured primarily in small toxic labs (STLs) located in homes, tents, barns, or hotel rooms. According to the plaintiffs (a number of counties in Arkansas), Arkansas had one of the highest numbers of STLs in the nation. The counties alleged that they had spent significant amounts of taxpayer dollars combating the manufacture of methamphetamine, including law enforcement costs for locating, eliminating, and cleaning up STLs; prison and jail costs for housing illegal users, dealers, and manufacturers; addiction treatment costs for users and addicts; payments to family service agencies for housing and treating children whose parents were arrested on meth-related charges; and costs for treating the physical side effects of meth use and exposure to its production. To recoup these costs, the plaintiffs sought compensation from Pfizer, Inc., and other manufacturers of cold and allergy medicines. They brought the suit against these manufacturers because meth cannot be produced without ingredients from their cold and allergy medicines. What ethical duties, if any, do you think the drug manufacturers

owe to the state or people in this case? Apply the WH framework to help reach your conclusions. Source: Ashley County et al. v. Pfizer, Inc., 552 F.3d 659; 2009 U.S. App. LEXIS 19. Todd Russell Dolezal is a bail bondsman who was slapped with a misdemeanor, a $1000 fine, and a probationary period of one year for soliciting bail in violation of California Code of Regulations, title 10, 170*170 section 2079.1. Section 2079.1 bans bail bondsmen from directly soliciting bail in jail facilities or court facilities. Furthermore, “any solicitation [regarding bail] of an arrestee himself. . . shall be only after a bona fide request for bail services has been received from the arrestee. . .” In 2013, Dolezal tried to appeal on grounds that the regulation violated his First Amendment right, but the appeals court affirmed the previous result. What purpose does section 2079.1 serve within the context of the WH process? Who does this law protect? Why would a law like this be necessary? Source: People v. Dolezal, 221 Cal. App. 4Th 167 (2013). Dragon, a speech recognition technology company considered to be “a leader in speech technology products” and valued at $600 million, was in perilous straits. Despite being valued so highly, the company lost money in every year of its existence except for one year. Dragon was sorely in need of capital. Dragon considered merging with another company to sustain itself until it could develop its technologies further and make them profitable. To go about this business, Dragon entered into a contract with Goldman Sachs on December 8, 1999, to “provide [Dragon] with financial advice and assistance in connection with this potential transaction, which may include performing valuation analysis, searching for a purchaser acceptable to [Dragon], coordinating visits of potential purchasers and assisting [Dragon] in negotiating the financial aspects of the transaction.” Goldman formed a four-member team to conduct financial due diligence on Lernout & Hauspie Speech Products N.V. (“L & H”), a company that had offered to buy Dragon for $580 million paid in stock. Goldman’s assessment of L & H was “positive in the overall” but “did not give an opinion pro or con on the transaction.” In June 2000, the Dragon board approved the merger with L & H and ceased to become an independent entity. Unfortunately for the ex-board members of Dragon, The Wall Street Journal reported that L & H had vastly overstated its revenues in an August 2000 article. The SEC promptly began investigating L & H’s financial statements. L & H had improperly recorded $373 million in revenue and was forced to restate its financials for the past two and a half years. In November 2000, L & H filed for bankruptcy and the share of L & H stock used to pay for the merger became worthless. Naturally, the ex-board members of Dragon took Goldman Sachs to trial for negligent performance of services, gross negligence, and intentional and negligent misrepresentation,

among other claims. However, the court ruled in favor of Goldman on January 23, 2013, and an appeal for a new trial by the plaintiffs on the grounds of evidentiary errors and erroneous jury instructions was rejected by the First Circuit Appeals Court on November 12, 2014. L & H's fraudulent actions obviously caused harm to the shareholders of Dragon. Who are some less obvious stakeholders, as defined by the WH Process, that were negatively affected by L & H? During the trial, it was noted that Goldman's team had not disclosed their concern about the status of due diligence of L & H to Dragon because "the client did not ask." How ethical was this course of action? Source: James and Janet Baker; Paul G. Bamberg and Robert Roth v. Goldman, Sachs & Co., 771 F.3d 37 (1st Cir. 2014). Titan Distribution Inc. had subcontracted with a company that provided employees, but Titan later decided to hire its own employees and end the subcontracting contract. Robert Chalfant worked for the subcontracted company, and when Titan made this change, Chalfant sought the same position with Titan that he had held while employed by the subcontractor. Although Titan initially indicated that Chalfant passed his physical examination and would be hired, the company subsequently decided that he failed the physical and did not hire him. The evidence indicated that Titan mistakenly believed that Chalfant's physical ailments substantially limited his ability to work, that he previously performed and remained able to perform the functions of the job, and that the refusal to hire him on the basis of the allegedly failed physical was linked to his disability. Further, Titan's inconsistent and unexplained decision-making process, with knowledge of the federal discrimination laws, was sufficient to support an award of punitive damages. Later you will learn about discrimination, but right now, consider the ethical issues of this case. What values are at odds in the dilemma outlined in this case? Source: Chalfant v. Titan Distribution, Inc., 475 F.3d 982 (2007).

Part 1 The Legal Environment of Business CHAPTER 3 The U.S. Legal System and Alternative Dispute Resolution Page 31 CASE OPENER Questionable Jurisdiction over Caterpillar James Lewis, a resident of Kentucky, sustained an injury while operating a Caterpillar bulldozer. He filed suit against Caterpillar, a company incorporated in Delaware but with its principal place of business in Illinois. Lewis also filed suit against the supplier of the bulldozer, Whayne Supply Company, whose principal place of business was Kentucky. Lewis filed his case in a Kentucky state court, alleging defective manufacture,

negligence, failure to warn, and breach of warranty. Lewis and Whayne Supply Company agreed to settle out of court. Caterpillar then filed a motion to exercise its right of removal (its right to move the case from the state to the federal court system), arguing that the federal court had jurisdiction over the case because Caterpillar and Lewis were from different states. Lewis disagreed with Caterpillar's contention, claiming that because he had not completed his settlement with Whayne, the case still included a defendant (Whayne) from Lewis's state, Kentucky. Thus, Lewis argued, federal courts did not have jurisdiction over the case. The court agreed with Caterpillar's argument and moved the case to a federal district court. Shortly thereafter, Lewis and Whayne finalized their settlement agreement, and the district court dismissed Whayne from the lawsuit. The federal district court granted Caterpillar a favorable judgment. Lewis, however, appealed the district court's decision, renewing his argument that the district court did not have jurisdiction over the case. The court of appeals agreed with Lewis, holding that because Whayne was a defendant in the case at the time that Caterpillar moved the case from state to federal court, the diversity of citizenship necessary to give the federal court jurisdiction over the case was absent. Thus, a state court should have resolved the dispute. Consequently, the appellate court vacated the district court's decision. Caterpillar then appealed to the U.S. Supreme Court. What factors determine whether the state or federal court system hears a case? If you were a businessperson with Caterpillar, why might you prefer a federal court to hear the dispute with Lewis, rather than a state court? LEARNING OBJECTIVES LO 3-1 Explain the different types of jurisdiction a court must have before it can render a binding decision in a case. LO 3-2 Recall the rules related to choice of venue. LO 3-3 Identify the threshold requirements that must be met before a court will hear a case. LO 3-4 Recognize the steps in civil litigation. LO 3-5 Compare the various forms of alternative dispute resolution used by businesses today. Page 32 As the Case Opener illustrates, when a dispute arises, parties in this country do not simply "go to court." They often must choose between federal and state court systems. This chapter examines these systems as well as the trial procedures that apply in civil cases.

Jurisdiction A useful way to understand jurisdiction is to think of it as courts' power to hear cases and render decisions that bind the parties before them. A court must have several types of jurisdiction to decide any particular case. Original Versus Appellate Jurisdiction Trial courts, or courts of original jurisdiction, have the power to hear and decide cases when they first enter

the legal system. In these courts, the parties present evidence and call witnesses to testify. In most states, these courts are called courts of common pleas or county courts. In the federal system, these trial courts are called federal district courts. Appellate courts, or courts of appellate jurisdiction, have the power to review previous judicial decisions to determine whether trial courts erred in their decisions. Appellate courts do not hold trials. Instead, appellate judges review transcripts of trial court proceedings and occasionally consider additional oral and written arguments from each party. Appellate courts handle only questions of law, not questions of fact. A question of law is an issue concerning the interpretation or application of a law. In contrast, a question of fact is a question about an event or characteristic in the case. For example, whether a white student yelled racial slurs on a college campus is a question of fact. On the other hand, whether the First Amendment protects the student's right to utter racial slurs is a question of law. Only judges can decide questions of law. Trial courts determine questions of fact. In a bench trial (a trial with no jury), the judge decides questions of fact; in a jury trial, the jury decides questions of fact. Appellate courts can, however, overrule trial courts' decisions on questions of fact, but only when the trial court's finding was clearly erroneous or when no trial evidence supports the trial court's finding. Jurisdiction over Persons and Property LO 3-1 Explain the different types of jurisdiction a court must have before it can render a binding decision in a case. Page 33 In personam jurisdiction (literally, "jurisdiction over the person") is a court's power to render a decision affecting the rights of the specific persons before the court. Generally, a court's power to exercise in personam jurisdiction extends only over a specific geographic region. In the state court system, a court's in personam jurisdiction usually extends to the state's borders. In the federal system, each court's jurisdiction extends across its geographic district. When a person (the plaintiff) files a lawsuit with the court, the court acquires in personam jurisdiction over that person. When the court gives the person the plaintiff is suing (the defendant) a copy of the complaint and a summons, the court acquires jurisdiction over that person. The complaint specifies the factual and legal basis for the lawsuit and the relief the plaintiff seeks. The summons is a court order that notifies the defendant of the lawsuit and explains how and when to respond to the complaint. Service of process is the procedure by which courts present these documents to defendants. Traditionally, courts used personal service: An officer of the court handed the summons and complaint to the defendant. Over time, however, courts began to employ other methods of service, including residential service, in which a court representative leaves the summons and complaint with a responsible

adult at the defendant’s home, and service by certified or ordinary mail. Increasingly, courts are authorizing service by email, especially in situations where it is difficult to find the defendant’s physical address. The reasons for recognizing this form of service are that (1) it is reasonably calculated to provide notice of the pending action, and (2) email is not substantially less likely to provide notice than the customary methods of providing notice. Recently, a few jurisdictions have even recognized service through Facebook accounts when traditional methods of service did not work.1 If the defendant is a corporation, courts generally serve either the president of the corporation or an agent whom the corporation has appointed to receive service. Most states require corporations to appoint an agent for service when they incorporate. Corporations are subject to in personam jurisdiction in three locations: the state of their incorporation, the location of their main offices, and the geographic areas in which they conduct business. Courts have in personam jurisdiction over persons only within a specific geographic region. In the past, a state court could not acquire in personam jurisdiction over out-of-state defendants unless it served the defendants within the court’s home state. Thus, defendants who injured plaintiffs could evade legal action by leaving the state and remaining outside its borders. To alleviate this problem, most states have enacted long-arm statutes that enable the court to serve defendants outside the state as long as the defendant has sufficient minimum contacts within the state. Each state has its own minimum-contact requirements, but most state statutes hold that acts such as committing a tort or doing business in the state are sufficient to allow the state to serve a defendant. In the Caterpillar case, the company sold products in Kentucky, and its products caused an injury in that state. These two facts were sufficient minimum contacts to allow the Kentucky court to serve Caterpillar, even though it was an out-of-state company. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Recall that in the Case Opener, the company sold products in Kentucky, and its products caused an injury in that state. Let’s say in the Case Opener that Caterpillar did not sell products in the state of Kentucky, but its products did cause an injury in that state. Could a Kentucky court still exercise in personam jurisdiction over Caterpillar and serve the company? Why or why not? In contrast to the situation in the opening scenario, the Florida appellate court did not find minimum contacts with that state to enable a foreign corporation to sue Columbia University, located in New York City, for a tort that allegedly occurred in New York. The court found that the fact that Columbia had alumni associations in Florida, owned some interactive classrooms in that state, and offered some online classes to residents did not constitute sufficient

minimum contacts for a lawsuit in which none of the tortious acts were alleged to have occurred in the state.2 CASE Nugget Minimum Contacts via the Internet Burdick v. Superior Court 233 Cal. App. (Ct. App 2015) When a defendant acts on the Internet to an online audience, it is difficult to know whether the court will find sufficient connections with an out of state defendant to allow the court to have in personam jurisdiction. Burdick, a consultant working for Nerium International, a skincare company, posted defamatory statements about two California bloggers, Sanderson and Taylor, who had questioned the safety and efficacy of one of Nerium's products on their blog. Sanderson and Taylor attempted to bring suit in California against Burdick, a resident of Illinois. He moved to quash the California summons on grounds that he did not have minimum contacts with the state of California. The court ruled that Burdick's post was clearly defamatory, but the post did not specifically target the forum state (California) and therefore Burdick did not have the minimal connection to the state necessary to try him there. The court noted that although Sanderson and Taylor were affected by the defamatory statements in California, the pair could not show that the post targeted or might be read by a significant number of other California residents. Page 34 As the E-Commerce and the Law box that follows illustrates, the Internet has created complications for the courts in determining when an Internet presence creates in personam jurisdiction over a website operator. There is a need to protect companies from being dragged to an infinite number of courts even though their customer bases may be nationwide; at the same time, there is a need to not impinge on the sovereignty of states by curtailing the conditions under which defendants may be commanded to appear in a state's court. E-Commerce and the Law The Sliding-Scale Standard for Internet Transactions Does a business that has Internet contact with a plaintiff in a different state satisfy the minimum-contacts standard? Anyone who engages in transactions over the Internet should be concerned about this question so that they do not unexpectedly find themselves forced to answer to a complaint in a very inconvenient location. A federal district court established the following "sliding-scale" standard the a 1997 case Zippo Mfg. Co. v. Zippo Dot Com, Inc.:3 [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the

Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website that is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites through which a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the website. Page 35 If a defendant has property in a state, a plaintiff may file suit against the defendant's property instead of against the owner. For example, suppose a Utah resident had not paid property taxes on a piece of land owned in Idaho. Idaho courts have in rem jurisdiction (Latin for "jurisdiction over the thing") over the property. Thus, an Idaho state court has the power to seize the property and sell it to pay the property taxes in an in rem proceeding. Subject-Matter Jurisdiction Subject-matter jurisdiction is a court's power to hear certain kinds of cases. Most industrialized countries have a single court system, with courts that have the power to hear both national law cases and local law cases. In contrast, the United States has both a state and a federal court system. Subject-matter jurisdiction determines which court system may hear a particular case. Cases may fall under state jurisdiction, exclusive federal jurisdiction, or concurrent jurisdiction. Exhibit 3-1 illustrates the subject-matter-jurisdiction divisions. Exhibit 3-1Subject-Matter Jurisdiction Divisions Exclusive Federal Jurisdiction The federal court system has exclusive jurisdiction over very few cases: admiralty cases; bankruptcy cases; federal criminal prosecutions; lawsuits in which one state sues another state; claims against the United States; and patent and copyright cases. Additionally, federal courts have exclusive jurisdiction over claims arising under federal statutes that specify exclusive federal jurisdiction. State Jurisdiction The state court system has a broad range of jurisdiction; state courts have the power to hear all cases not within the exclusive jurisdiction of the federal court system. State courts also have exclusive jurisdiction over certain cases, such as cases concerning adoption and divorce. Most cases, therefore, fall under state court jurisdiction. The Caterpillar case fell under state court jurisdiction because its subject matter —product liability and negligence—did not place the case under the exclusive jurisdiction of the federal court system. Concurrent Federal Jurisdiction Concurrent federal jurisdiction means that both state and federal courts have jurisdiction over a case. Concurrent jurisdiction covers two types of cases: federal-question and diversity-of-citizenship cases. Federal-question

cases require an interpretation of the U.S. Constitution, a federal statute, or a federal treaty. For example, suppose a plaintiff alleges that a Florida campaign-financing law violates his First Amendment free speech rights. Because this case raises a federal question, it falls under concurrent jurisdiction, and both state and federal courts have the power to hear it. Page 36 A diversity-of-citizenship case must satisfy two conditions: (1) The plaintiff(s) does (do) not reside in the same state as the defendant(s), and (2) the controversy concerns an amount in excess of $75,000. Courts use the location of a party's residence to determine whether diversity of citizenship exists. Most federal court cases are based on diversity of citizenship. A business may reside in two states: the state of its incorporation and the state of its principal place of business. Thus, in the Case Opener, Caterpillar was a resident of Delaware, the state where it incorporated, and of Illinois, the state of its primary place of business. Although the rule for determining what state a defendant is a citizen of may sound simple, determining where a corporation's principal place of business is caused a lot of controversy initially. Was it where most of the states' business activities occurred? Or was it where its headquarters was located? In Case 3-1, the Supreme Court finally clarified how courts should determine a corporation's principal place of business. CASE 3-1 HERTZ CORPORATION v. FRIEND United States Supreme Court 130 S. Ct. 1181 (2010) FACTS: California employees sued their employer, Hertz Corporation, in state court, alleging violations of the state's wage and hour laws. Defendant Hertz, claiming diversity of citizenship, removed the case to the federal district court. Hertz argued that it was a citizen of New Jersey because New Jersey is its principal place of business. It is its principal place of business because Hertz has facilities in 44 states, but its leadership is at its corporate headquarters in New Jersey, and its core executive and administrative functions are primarily carried out there. Hertz also stated that California accounted for only a small portion of its business activities. The District Court concluded that it lacked diversity jurisdiction because Hertz was a California citizen under Ninth Circuit precedent, which asks whether the amount of the corporation's business activity is "significantly larger" or "substantially predominates" in one state. Finding that California was Hertz's "principal place of business" under that test because a plurality of the relevant business activity occurred there, the District Court remanded the case to state court. Hertz appealed, and the Ninth Circuit Court of Appeals affirmed. Hertz then appealed to the U.S. Supreme Court. ISSUE: For purposes of establishing citizenship of a corporation to determine whether there is diversity of citizenship to give the federal court jurisdiction, what test should the courts use to determine a

corporation’s principal place of business, a nerve center test or a predominance of business activity test? REASONING: “Principal place of business” is best read as referring to where a corporation’s officers direct, control, and coordinate the corporation’s activities. In practice, it should normally be where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, that is, the nerve center, and not simply an office where the corporation holds its board meetings. Three reasons support use of the nerve center approach. The first is that the approach is consistent with the language of the jurisdictional statute. The statute’s word “place” is singular, not plural. Its word “principal” requires the main, prominent, or most important place to be chosen. And the fact that the word “place” follows the words “State where” means that the “place” is a place within a State, not the State itself. A corporation’s nerve center, usually its main headquarters, is a single place. The public often considers it the corporation’s main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts to look not at a particular place within a State but incorrectly at the State itself, measuring the total amount of business activity the corporation conducts there and determining whether it is significantly larger than in the next-ranking State. Second, administrative simplicity is desired in a jurisdictional statute. A nerve center approach, which ordinarily equates that center with a corporation’s headquarters, is simple to apply, comparatively speaking. Third, the statute’s legislative history suggests that the words “principal place of business” should be interpreted to be no more complex than an earlier, numerical test that was criticized as too complex and impractical to apply. A nerve center test offers such a possibility. A general business activities test does not. This test is relatively easier to apply and does not require courts to weigh corporate functions, assets, or revenues different in kind, one from the other. This test may produce results that seem to cut against the basic rationale of diversity jurisdiction; accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system. DECISION AND REMEDY: For purposes of federal court diversity jurisdiction, a corporation’s principal place of business refers to the place, often called nerve center, from which the corporation’s high-level officers directed, controlled, and coordinated corporation’s activities. Although it appeared from the evidence that Hertz corporate offices and its nerve center are located in New Jersey, the respondents should have a fair opportunity on remand to litigate this issue in light of this holding as to the applicable rule.

SIGNIFICANCE OF THE CASE: The case settles a long-standing conflict among the circuits about what test to apply to determine where a corporation’s primary place of business is. CRITICAL THINKING Which critical-thinking skill is the focal point of this case? Which words are not clear? ETHICAL DECISION MAKING What primary value can you hear in the court’s reasoning? Page 37 It is important to note that diversity must be complete for a case to fall under concurrent jurisdiction. In the Caterpillar case, Lewis argued that diversity was not complete because both he and the supply company, the second defendant he originally sued, were residents of Kentucky. The appellate court agreed with his argument and overturned the district court’s decision because the district court lacked subject-matter jurisdiction. When a plaintiff files a case involving concurrent jurisdiction in state court, the defendant has a right of removal. This right entitles the defendant to transfer the case to federal court. Thus, either party to a case involving concurrent jurisdiction can put the case in the federal court system: the plaintiff can file the case in federal court initially, or, if the case was initially filed in state court, the defendant can transfer the case to federal court by exercising the right of removal. In the Case Opener, Caterpillar exercised its right of removal, and the state trial court moved the case to a federal district court. BUT WHAT IF. . . Recall that in the Case Opener, Caterpillar filed a motion to exercise its right of removal to move the case to federal court. If it had not filed that motion, would the case have been held in state court, even though it fell under concurrent jurisdiction?

Venue LO 3-2 Recall the rules related to choice of venue. Once a case is in the proper court system, venue determines which trial court in the system will hear the case. Venue is a matter of geographic location that each state’s statutes determine. Usually, the trial court for the county where the defendant resides is the appropriate venue. If a case involves property, the trial court where the property is located is also an appropriate venue. Finally, if the focus of the case is a particular incident, the trial court where the dispute occurred is an appropriate venue. The plaintiff initially chooses from among the appropriate venues when filling the case. If the location of the court where the plaintiff filed the case is an inconvenience to the defendant or if the defendant believes it will be difficult to select an unbiased jury in that venue, the defendant may request that the judge move the case by filing a motion for a change of venue. The judge has the discretion to grant

or deny the motion. Forum Selection and Choice of Law Page 38 Businesses that are involved in frequent litigation realize that sometimes time and money can be wasted in arguing over which court should hear the case and which law should apply. To minimize extra costs associated with future litigation, many businesses will include in their contracts a forum-selection clause, a choice-of-law clause, or both. See Exhibits 3-2 and 3-3 for examples of these clauses. In a forum-selection clause, the parties specify which court would hear a dispute over an alleged breach of the contract. While initially there was some uncertainty as to the enforceability of these clauses, the following U.S. Supreme Court case provides some guidance as to their enforceability. CASE 3-2 ATLANTIC MARINE CONSTRUCTION COMPANY, INC. v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS ET AL. United States Supreme Court 134 S. Ct. 568 (2013) FACTS: Atlantic Construction Company, located in Virginia, subcontracted with Texas-based J-Crew Management. Despite the contract containing a clause stating that any dispute would be litigated in Virginia, J-Crew brought suit against Atlantic in the District Court for the Western District of Texas for failure to pay J-Crew for work it performed. Atlantic moved to dismiss the suit, arguing that the forum selection clause required the suit to be brought in Virginia. The District Court denied Atlantic's motions, claiming that Atlantic did not show why it was in the interest of justice to hear the trial in Virginia. Atlantic appealed, and the court of appeals denied Atlantic's motions on the ground that a Texas court was proper venue given that the parties entered into and performed the agreement in that district. Atlantic appealed to the Supreme Court. ISSUE: Did the forum-selection clause give Atlantic the ability to dismiss the case? REASONING: The ruling in this case revolved around USC §1404(a), which states "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." According to the Court, the statute holds that a forum selection clause should be enforced with a motion to transfer rather than the motion to dismiss that Atlantic sought. The Supreme Court argued that the district and appeals courts erred in outright dismissing the case. Under the Court's own precedent set by Stewart Organization, Inc. v Ricoh Corp., a case may only be dismissed when a venue is "wrong" or "improper." And even if a forum-selection clause renders a venue to be "wrong" or "improper," the clause in question in this case is to be enforced under the doctrine of forum non conveniens, meaning the case is to be transferred to another federal court should the current forum prove inappropriate. To put another dent in the lower courts' decisions, the Court

held that Stewart places upon the plaintiff the burden of establishing that transfer to the contractual forum is unwarranted. Thus, the district court erred in placing the burden of proving that the preselected forum was appropriate upon Atlantic instead of requiring J-Crew to prove that a transfer was disfavored due to public-interest factors. DECISION: The Supreme Court reversed and remanded the court of appeals decision; the lower court was to decide whether Atlantic had grounds to transfer the case instead of dismissing it. SIGNIFICANCE: This case serves as an example of a challenge to the appropriateness of the venue, and demonstrates who has the burden of proof in such a dispute. CRITICAL THINKING What is the single fact that has the greatest impact on this decision? What is the logic of relying on this fact to such a large extent? ETHICAL DECISION MAKING Building on your answer to the critical thinking question above, identify the value that the court is leaning on to prop up its reasoning about why the courts should have acted to enforce the original agreement between the two contending parties. While we think of forum selection clauses as benefiting businesses because they allow parties to select where a case can be heard, the U.S. Supreme Court illustrated how sometimes these clauses can impose unexpected costs on the parties when these clauses are not carefully negotiated. In the Sky Reefer1 case, the high court upheld a forum selection clause hidden in a bill of lading specifying that disputes related to the shipment would be resolved through arbitration in Tokyo. The high court upheld the choice of a foreign forum despite the increased costs of litigating in a distant forum. Page 39 BUT WHAT IF. . . Facebook has its principal place of business in Palo Alto, California. During the process of signing up for a Facebook account, you fill out a lot of personal information and click “Sign Up.” A line then appears that says, “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” A hyperlink is available, and if you click on it, it takes you to the Terms, which include a provision that all disputes between Facebook and the user will be resolved in a federal or state court in Palo Alto, California. You live in New York City. If you file a claim against Facebook in the Federal District Court located in New York City and Facebook files a motion to dismiss your case or transfer it to the Federal District Court in Palo Alto, what do you think the outcome will be, and why? Exhibit 3-2Sample Forum Selection Clause SAMPLE FORUM SELECTION CLAUSE Any lawsuit, claim or other action to enforce the terms of this Agreement shall be brought exclusively in the state courts of Nye County, Nevada. The parties to this Agreement hereby submit to the jurisdiction of the foregoing courts and waive any objection either may have to said courts asserting jurisdiction over them or their assets and property. A choice-of-law clause is what its name

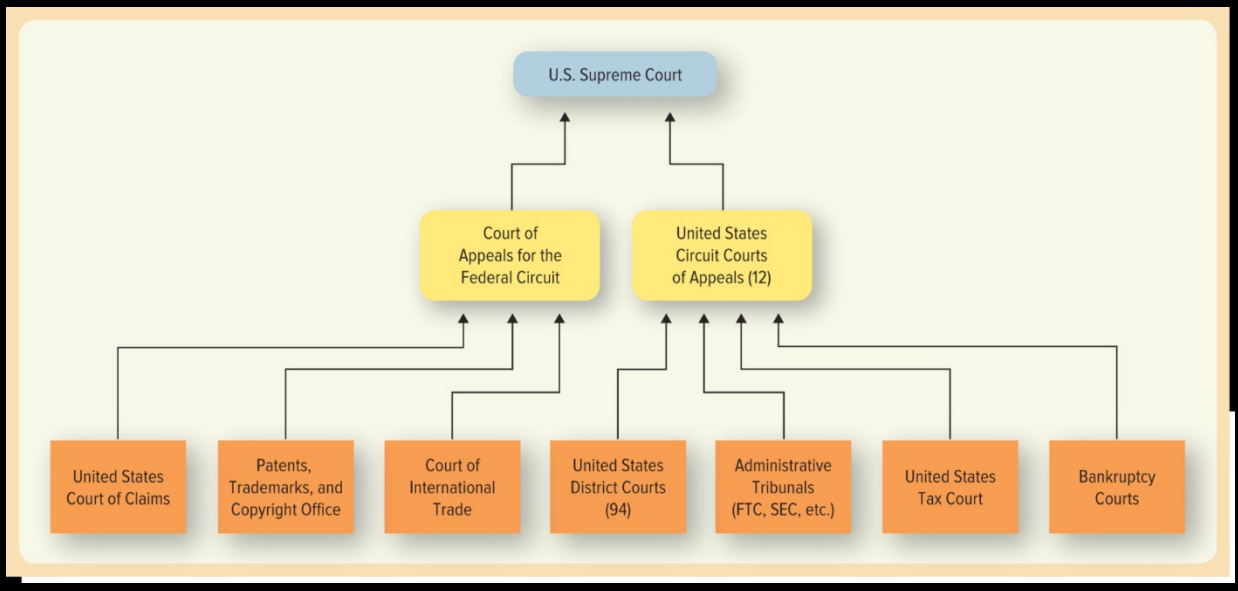
implies. It is a clause inserted into the contract that specifies which law will be applied to resolve any disputes that arise under the contract. This kind of clause can be especially useful when you have parties from different states or different countries entering into a contract. While a court does not have to uphold a choice-of-law clause, normally they will uphold the clause as long as there is some connection between the choice of law and the location of the transaction or one of the parties to the dispute. For example, a Michigan farmer and a Delaware corporation that does business in several states may include a choice-of-law clause that specifies that the state law of Michigan will apply to any disputes arising under the contract. The parties might also include a choice-of-forum clause stating that any disputes will be resolved in the Federal District Court located in Wayne County, Michigan. Exhibit 3-3Sample Choice of Law Clause SAMPLE CHOICE OF LAW CLAUSE This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio, as such laws are applied to contracts entered into and performed in such State.

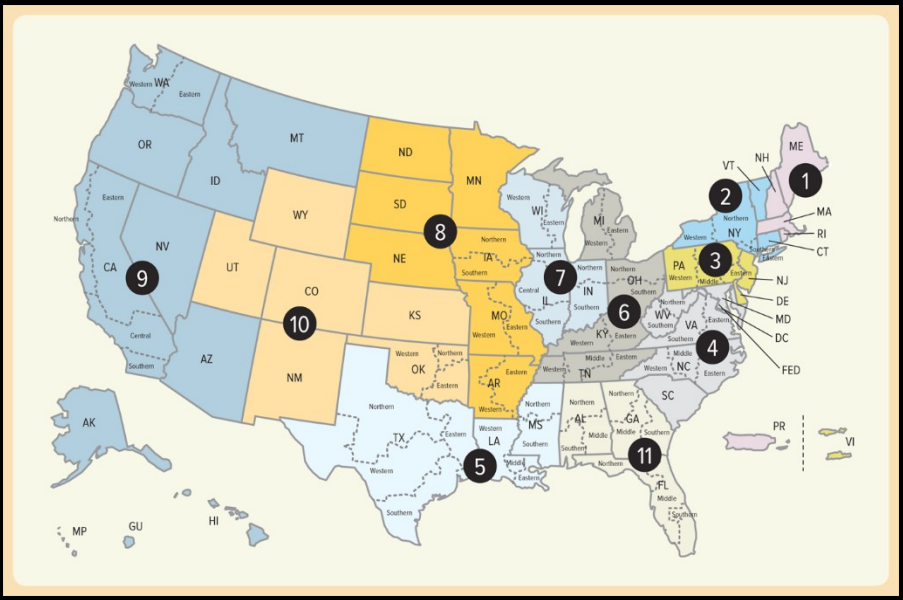
The Structure of the Court System Page 40 The U.S. legal system has two parallel court structures: a federal system and a state system. Once a plaintiff files a case in one of the systems, the case remains in that system throughout the appeals process. The only exception to this rule occurs when a party to a lawsuit appeals the decision of a state supreme court to the U.S. Supreme Court. The Federal Court System The federal court system derives its power from Article III, Section 2, of the U.S. Constitution and consists of three main levels: trial courts, intermediate appellate courts, and the court of last resort. Exhibit 3-4 illustrates this system. Exhibit 3-4The Federal Court System Federal Trial Courts In the federal court system, the trial courts, or courts of original jurisdiction, are U.S. district courts. The United States has 94 districts; each district has at least one trial court of general jurisdiction. Courts of general jurisdiction have the power to hear a wide range of cases and can grant almost any type of remedy. Almost every case in the federal system begins in one of these courts. A small number of cases, however, do not begin in trial courts of general jurisdiction. For cases concerning certain subject matter, Congress has established special trial courts of limited jurisdiction. The types of cases heard by these special trial courts include bankruptcy cases; claims against the U.S. government; and copyright and patent cases. In an extremely limited number of cases, the U.S. Supreme Court functions as a trial court of limited jurisdiction. These cases include controversies between states and lawsuits against foreign ambassadors.

Intermediate Courts of Appeal The U.S. circuit courts of appeal make up the second level of courts in the federal system. The United States has 11 numbered circuit courts, plus a federal circuit court of appeals that hears appeals from government administrative agencies. Each numbered circuit court hears appeals from district courts in its geographic area. Exhibit 3-5 illustrates the geographic circuit divisions.Page 41 Not pictured on the chart is the D.C. Circuit Court of Appeals, located in Washington, D.C. Exhibit 3-5The Circuits of the Federal Court System The Court of Last Resort The U.S. Supreme Court is the final appellate court in the federal system. Nine justices, who have lifetime appointments, make up the high court. Exhibit 3-6 identifies the nine justices on the U.S. Supreme Court. Exhibit 3-6U.S. Supreme Court Justices, 2022 The U.S. Supreme Court hears appeals of cases from the court of last resort in a state system. The Court will not, however, hear cases considering questions of pure state law. The Court also functions as a trial court on rare occasions. State Court Systems No uniform state court structure exists because each state has devised its own court system, but most states have a structure similar to the federal court system's structure. State Trial Courts In state court systems, most cases begin in a trial court of general jurisdiction. As in the federal system, state trial courts of general jurisdiction have the power to hear all cases over which the state court system has jurisdiction except those cases for which the state has established special trial courts of limited jurisdiction. Most states have a trial court of general jurisdiction in each county. The names of these courts vary by state, but most states refer to them as courts of common pleas or county courts. In some states, these courts have specialized divisions such as domestic relations and probate. Page 42 Most states also have trial courts of limited jurisdiction. Usually, these courts can grant only certain remedies. For example, small claims courts, a common type of court of limited jurisdiction in most states, may not grant damage awards larger than a specified amount. Other courts of limited jurisdiction have the power to hear only certain types of cases. For example, probate courts hear only cases about asset and obligation transfers after an individual's death. Intermediate Courts of Appeal Intermediate courts of appeal, analogous to federal circuit courts of appeal, exist in approximately half the states. These courts usually have broad jurisdiction, hearing appeals from courts of general and limited jurisdictions as well as from state administrative agencies. The names of these courts vary by state, but most states call them courts of appeal or superior courts. Courts of Last Resort Appeals from the state intermediate courts of appeal lead cases to the state court of last resort. Most states call this court the supreme court, although

some states refer to it as the court of appeals. Because approximately half of the states lack intermediate courts of appeal, appeals from trial courts in these states go directly to the state court of last resort.

Associate Justice
Clarence Thomas
Appointed in 1991 by President G.H.W. Bush
Source: Steven Petteway, Collection of the Supreme Court of the United States
Chief Justice
John G. Roberts
Appointed in 2005 by President G.W. Bush
Source: Steven Petteway, Collection of the Supreme Court of the United States
Associate Justice
Samuel Alito
Appointed in 2006 by President G.W. Bush
Source: Steven Petteway, Collection of the Supreme Court of the United States
Associate Justice
Sonia Sotomayor
Appointed in 2009 by President Barack Obama
Source: Steven Petteway, Collection of the Supreme Court of the United States
Associate Justice
Elena Kagan
Appointed in 2010 by President Barack Obama
Source: Steven Petteway, Collection of the Supreme Court of the United States
Associate Justice
Neil Gorsuch
Appointed in 2017 by President Donald Trump
Source: Franz Jantzen, Collection of the Supreme Court of the United States
Associate Justice
Brett Kavanaugh
Appointed in 2018 by President Donald Trump
Source: Fred Schilling, Collection of the Supreme Court of the United States
Associate Justice
Amy Coney Barrett
Appointed in 2020 by President Donald Trump
Source: Reuters/AlamyStock Photo
Associate Justice
Ketanji Brown Jackson
Appointed in 2022 by President Joe Biden
Source: Justin Sullivan/Getty Images

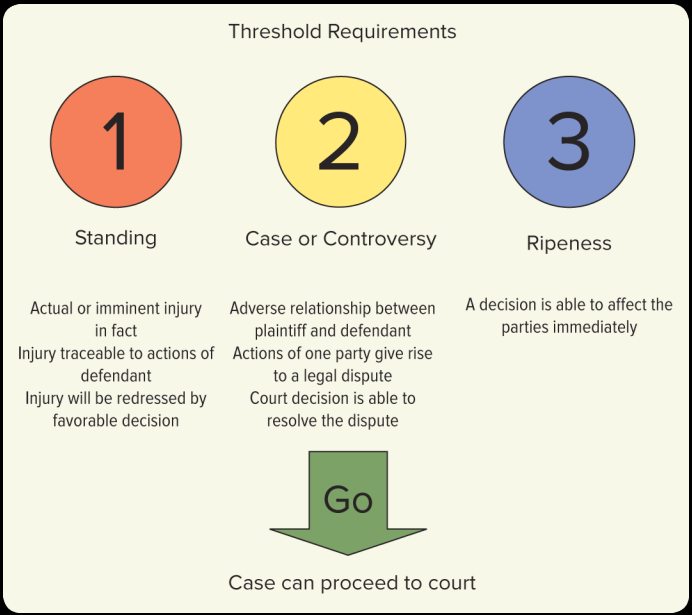

U.S. Supreme Court
Court of Appeals for the Federal Circuit
United States Circuit Courts of Appeals (12)
United States Court of Claims
Patents, Trademarks, and Copyright Office
Court of International Trade
United States District Courts (94)
Administrative Tribunals (FTC, SEC, etc.)
United States Tax Court
Bankruptcy Courts



Threshold Requirements LO 3-3 Identify the threshold requirements that must be met before a court will hear a case. Before a case makes it to court, it must meet three threshold requirements. These requirements ensure that courts hear only cases that genuinely require adjudication. The three requirements are standing, case or controversy, and ripeness (see Exhibit 3-7). Page 43 Exhibit 3-7Threshold Requirements Standing A person who has the legal right to bring an action in court has standing (or standing to sue). For a person to have standing, the outcome of a case must personally affect him or her. Thus, if you hire a landscaper to mow your lawn every week and they fail to show up every other week, you have standing to sue your landscaper. But if your friend hired the landscaper, you lack the standing to sue on your friend’s behalf because you do not have a personal stake in the outcome of the case. The reason the American legal system requires this personal stake in the outcome is the belief that the plaintiff’s personal stake stimulates them to present the best possible case. The requirements for standing, according to the 2000 U.S. Supreme Court case Friends of the Earth v. Laidlaw Environmental Services,4 are (1) the plaintiff must have an injury in fact that is concrete and actual or imminent; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely that the injury will be redressed by a favorable decision.5 In applying those criteria to the Laidlaw case, the Supreme Court found that FOE members’ testimony that they were afraid to fish and swim in a river they previously

enjoyed satisfied the first two criteria. The Court held that although the FOE members would not directly receive money from a penalty against Laidlaw, they would benefit because the penalties would deter Laidlaw and other companies from polluting the river in the future.6 The Court ruled in FOE's favor and assessed Laidlaw a $405,800 penalty payable to the U.S. Treasury. Case or Controversy The case-or-controversy (or justifiable controversy) requirement ensures that courts do not render advisory opinions. Three criteria are necessary for a case or controversy to exist. First, the relationship between the plaintiff and the defendant must be adverse. Second, actual or threatened actions of at least one of the parties must give rise to an actual legal dispute. Third, courts must have the ability to render a decision that will resolve the dispute. In other words, courts can give final judgments that solve existing problems; they cannot provide rulings about hypothetical situations.Page 44 Ripeness The case-or-controversy requirement is closely linked to the ripeness requirement. A case is ripe if a judge's decision is capable of affecting the parties immediately. Usually the issue of ripeness arises when one party claims that the case is moot—in other words, there is no point in the court's hearing the case because no judgment can affect the situation between the parties. When thinking about ripeness, if the lawsuit involves the violation of an agency regulation, it is important to consider the exhaustion of remedies doctrine. This doctrine requires that before taking a case to court, the party must exhaust all of their administrative remedies first. So, before filing a civil case over the violation of agency regulations, you must make sure that you have pursued all of the possible remedies available through the administrative agency responsible for the regulation. In the Laidlaw case, Laidlaw argued that the case was moot because by the time the case went to trial, the company had complied with the requirements of its discharge permits. The Supreme Court disagreed, ruling that the fact that a defendant voluntarily ceases a practice once litigation has commenced does not deprive a federal court of its power to determine the legality of the practice, because such a ruling would leave the defendant free to return to his old unlawful practices. Thus, the Court found the case was not moot because imposing a penalty on the defendant would have an important deterrent effect.7 Statutes of Limitation One other factor that comes into play when a party is deciding to litigate is the statute of limitations. A statute of limitations is a law that limits the time during which a plaintiff can file a lawsuit after the cause of action has arisen. In a breach of contract case, for example, the statute would begin to run on the day that the contract was breached. In a tort case, the statute begins to run on either the day the injury occurred or the day it was discovered. When the time for

filing the case has run out, we say that the statute of limitations has tolled. The purpose of the statute of limitations is to make sure that the case is brought when the evidence related to the case is most likely to still be available. The length of the statutes vary depending on the type of case and the state, so whenever you have a claim arise, it is crucial that you determine the length of your state's statute of limitation for that type of action so that you do not lose your ability to bring your action. Statutory time limits typically range from one to six years for civil cases.


Threshold Requirements
1
2
3
Standing
Case or Controversy
Ripeness
Actual or imminent injury in fact
Injury traceable to actions of defendant
Injury will be redressed by favorable decision
Adverse relationship between plaintiff and defendant
Actions of one party give rise to a legal dispute
Court decision is able to resolve the dispute
A decision is able to affect the parties immediately
Go
Case can proceed to court

Steps in Civil Litigation LO 3-4 Recognize the steps in civil litigation. The U.S. litigation system is an adversary system: A neutral fact finder—a judge or jury—hears evidence and arguments that opposing sides present and then decides the case on the basis of the facts and law. Strict rules govern the types of evidence fact finders may consider. Theoretically, fact finders make informed and impartial rulings because each party has an incentive to find all relevant evidence and make the strongest possible arguments on behalf of her or his position. Critics of the adversary system, however, point out several drawbacks: the time and expense each lawsuit requires, the damage a suit may cause to the litigating parties' relationship, and the unfair advantage to those with wealth and experience using the court system. The Pretrial Stage The rules of civil procedure govern civil case proceedings. The Federal Rules of Civil Procedure apply in all federal courts. Each state has its own set of rules, but most states' rules are very similar to the Federal Rules

of Civil Procedure. In addition, each court usually has its own set of local court rules. Page 45 Informal Negotiations The initial attempt to resolve a business dispute is usually informal: a discussion or negotiation among the parties to try to find a solution. If the parties are unable to resolve their dispute, one party often seeks an attorney's advice. Together, the attorney and client may be able to resolve the dispute informally with the other party. Pleadings The first formal stage of a lawsuit is the pleading stage. The plaintiff's attorney initiates a lawsuit by filing a complaint in the appropriate court. The complaint states the names of the parties to the action, the basis for the court's subject-matter jurisdiction, the facts on which the plaintiff bases the claim, and the relief the plaintiff seeks. The pleadings prevent surprises at trial; they allow attorneys to prepare arguments to counter the other side's claims. Exhibit 3-8 shows a typical complaint. Exhibit 3-8A Typical Complaint THE COURT OF COMMON PLEAS OF CLARK COUNTY, NEVADA Bob Lyons and Sue Lyons, Plaintiffs v. Christine Collins, Defendant COMPLAINT FOR NEGLIGENCE Case No. _____ Now come the plaintiffs, Bob Lyons and Sue Lyons, and, for their complaint, allege as follows: Plaintiffs, Bob Lyons and Sue Lyons, both of 825 Havercamp Street, are citizens of Clark County, in the state of Nevada, and defendant, Christine Collins, 947 Rainbow Ave., is a citizen of Clark County in the state of Nevada. On May 1, 2001, the defendant built a wooden hanging bridge across a stream that runs through the plaintiffs' property at 825 Havercamp Street. Defendant negligently used ropes in the construction of the bridge that were not thick enough to sustain human traffic on the bridge. At approximately 4:00 p.m., on May 20, 2001, the plaintiffs were attempting to carry a box of landscaping stones across the bridge when the ropes broke, and the bridge collapsed, causing plaintiffs to fall seven feet into the stream. As a result of the fall, plaintiff, Bob Lyons, suffered a broken arm, a broken leg, and a skull fracture, incurring $160,000 in medical expenses. As a result of the fall, plaintiff, Sue Lyons, suffered two broken cervical vertebrae, and a skull fracture, incurring $300,000 in medical expenses. As a result of the fall, the landscaping stones, which had cost $1,200, were destroyed. As a result of the foregoing injuries, plaintiff, Bob Lyons, was required to miss eight weeks of work, resulting in a loss of $2,400 in wages. As a result of the foregoing injuries, plaintiff, Sue Lyons, was required to miss 12 weeks of work, resulting in a loss of $3,600 in wages. WHEREFORE, plaintiffs demand judgment in the amount of $467,200, plus costs of this action. Harlon Elliot Attorney for plaintiffs 824 Sahara Ave. Las Vegas, Nevada, 89117 JURY DEMAND Plaintiffs demand a trial by jury in this matter. Service of Process To obtain in personam jurisdiction over a defendant and to satisfy due process, a court must notify the defendant of

the pending lawsuit. Service of process occurs when a representative of the court serves (delivers) a copy of the complaint and a summons to the defendant. The complaint explains the basis of the lawsuit to the defendant. The summons tells the defendant that if he or she does not respond to the lawsuit within a certain period of time, the plaintiff will receive a default judgment. A default judgment is a judgment in favor of the plaintiff that occurs when the defendant fails to answer the complaint and the plaintiff's complaint alleges facts that would support such a judgment. Defendant's Response The defendant typically responds to the complaint with an answer. In this document, the defendant denies, affirms, or claims no knowledge of the accuracy of the plaintiff's allegations. However, in some cases, when the defendant believes that even if the facts the plaintiff alleges are true, the plaintiff would not have proven a case against the defendant, the defendant would file a motion to dismiss. For example, if a plaintiff filed a breach of contract case against the defendant but failed to allege that there was a contract between the two of them, the defendant could file a motion to dismiss. A defendant uses an affirmative defense when his or her answer admits that the facts contained in the complaint are accurate but also includes additional facts that justify the defendant's actions and provide a legally sound reason to deny relief to the plaintiff. For example, if a woman sued a man for battery because he punched her in the face, he might claim that he hit her only because she aimed a gun at him and threatened to shoot. His claim that he was acting in self-defense is an affirmative defense. If the defendant plans to raise an affirmative defense, he must raise it in his answer to give the plaintiff adequate notice. If he fails to raise an affirmative defense in the answer, the judge will likely not allow him to raise it during the trial. Upon receiving the complaint, if the defendant believes that even though all the plaintiff's factual allegations are true, the law does not entitle the plaintiff to a favorable judgment, the defendant may file a motion to dismiss, or demurrer. (A motion is a request by a party for the court to do something; in this instance, the request is to dismiss the case.) In deciding whether to grant a motion to dismiss, a judge accepts the facts as stated by the plaintiff and rules on the legal issues in the case. Judges generally grant motions to dismiss only when it appears beyond a doubt that the plaintiff cannot prove any set of facts to justify granting the judgment sought. If the defendant believes he has a claim against the plaintiff, he includes this counterclaim with the answer. As Exhibit 3-9 shows, the form of a counterclaim is identical to the form of a complaint. The defendant states the facts supporting his claim and asks for relief. Exhibit 3-9Defendant's Answer and Counterclaim THE COURT OF COMMON PLEAS OF CLARK COUNTY,

NEVADA Bob Lyons and Sue Lyons, Plaintiffs v. Christine Collins, Defendant ANSWER AND COUNTERCLAIM FOR BREACH OF CONTRACT Case No. _____ Now comes the defendant, Christine Collins, and answers the complaint of plaintiffs herein as follows: FIRST DEFENSE Admits the allegations in paragraphs 1 and 2. Denies the allegation in paragraph 3. Is without knowledge as to the truth or falsity of the allegations contained in paragraphs 4, 5, 6, 7, 8, and 9. SECOND DEFENSE If the court believes the allegations contained in paragraph 3, which the defendant expressly denies, plaintiffs should still be denied recovery because they were informed prior to the construction of the bridge that there should be no more than one person on the bridge at one time and that no individual weighing more than 200 pounds should be allowed to walk on the bridge. COUNTERCLAIM On April 15, the parties agreed that the defendant would build a wooden hanging bridge across a stream that runs through the defendant's property at 825 Havercamp Street, in exchange for which plaintiffs would pay defendant $2,000 upon completion of construction. On May 1, 2001, the defendant built the agreed upon ornament, wooden, hanging bridge across a stream that runs through the defendant's property at 825 Havercamp Street, but plaintiffs failed to pay the agreed upon price for the bridge. By their failure to pay, plaintiffs breached their contract and are liable to defendant for the contract price of $2,000. WHEREFORE, defendant prays for a judgment dismissing the plaintiffs' complaint and granting the defendant a judgment against plaintiffs in the amount of $2,000 plus costs of this action. Melissa Davenport Attorney for Defendant 777 Decatur Ave. Las Vegas, Nevada 89117 If the defendant files a counterclaim, the plaintiff generally files a reply. A reply is an answer to a counterclaim. In the reply, the plaintiff admits, denies, or claims a lack of knowledge of the accuracy of the facts of the defendant's counterclaim. If an affirmative defense is planned, the plaintiff must raise it in the reply. Page 46 Pretrial Motions The early pleadings establish the legal and factual issues of the case. After the pleadings, the plaintiff or defendant may file a motion to conclude the case early, eliminate some claims, or gain some advantage. A party may move, or request, the court to do almost anything pertaining to the case. For example, if the plaintiff files a suit about the right to a piece of property, they may move that the court prohibit the current possessor of the land from selling it. Courts may grant or deny such motions at their discretion. When a party files a motion with the court, the court sends a copy to the opposing attorney, who may respond to the motion, usually by requesting that the judge deny the motion. In many cases, the judge rules on the motion immediately. In other cases, the judge holds a hearing at which the attorneys for both sides

argue how the judge should decide the motion. Two primary pretrial motions are a motion for judgment on the pleadings and a motion for summary judgment. Once the parties file the pleadings, either party can file a motion for judgment on the pleadings. The motion is a request for the court to consider that all the facts in the pleadings are true and to apply the law to those facts. The court grants the motion if, after this process, it finds that the only reasonable decision is in favor of the moving party. Page 47 Discovery After filing the initial pleadings and motions, the parties gather information from each other through discovery. The discovery process enables the parties to learn about facts surrounding the case so that they are not surprised in the courtroom. Three common discovery tools are interrogatories, requests to produce documents, and depositions. Interrogatories are written questions that one party sends to the other to answer under oath. Frequently, a request to admit certain facts accompanies interrogatories. Attorneys work with their clients to answer interrogatories and requested admissions of facts. Sometimes interrogatories are called requests for further information. A request to produce documents (or other items) forces the opposing party to produce (turn over) certain information unless it is privileged or irrelevant to the case. Parties may request documents such as photographs, contracts, written estimates, medical records, tax forms, and other government documents. In tort cases, the defendant frequently asks the plaintiff to submit a mental- or physical-examination report. Page 48 Finally, the parties may obtain testimony from a witness before trial through a deposition. At a deposition, attorneys examine a witness under oath. A court reporter (stenographer) records every word the witness and attorneys speak. Both parties receive a copy of the testimony in document form. Depositions provide information and may also set up inconsistencies between a witness’s testimony at the deposition and their testimony at trial. If a party discovers an inconsistency in the testimony of one of the other party’s witnesses, they can bring the inconsistency to the fact finder’s attention to diminish the witness’s credibility. The parties may also use depositions when a witness is elderly, moving, or ill and thus may be unavailable at the time of the trial. If a party does not comply with requests for discovery, the court may admit the facts the other party sought to discover. Attorneys who feel that certain material is outside the scope of the case often argue that the material is irrelevant to the case. If the court disagrees, however, the party must supply the requested information. Although these discovery tools are important in the United States, many countries do not have a discovery process. After the discovery process, either party can file a motion for summary judgment. The motion asserts

that no factual disputes exist and that if the judge applied the law to the undisputed facts, the only reasonable decision would be in favor of the moving party. The difference between this motion and a motion for judgment on the pleadings is that in a motion for summary judgment, the moving party may use affidavits (sworn statements from the parties or witnesses), relevant documents, and depositions or interrogatories (a party's sworn answers to written questions) to support their motion. The judge examines the evidence and grants the motion if no factual disputes are found or denies the motion and sends the case to trial if factual issues are found about which the parties disagree. Perhaps the most well-known illustration of the use of the motion for summary judgment is in the case of Jones v. Clinton (FN 990 F.Supp 657 (1998)). In that sexual harassment case, Clinton sought summary judgment, contending that there was insufficient evidence to support the employee's claim, and the court agreed, finding that the employee failed to support her claim of sexual harassment because she failed to show a tangible job detriment or adverse employment action, noting that she never missed a day of work, never asked to be relieved of the duties that required her to be in the presence of Clinton, and never filed a formal complaint. This case shows how important it is to allege all relevant facts in the complaint or risk having your claim denied through a motion for summary judgment. Pretrial Conference A pretrial conference precedes the trial. A pretrial conference is an informal meeting of the judge with the attorneys representing the parties. During this conference, the parties try to narrow the legal and factual issues and possibly work out a settlement. If the parties cannot reach a settlement, the attorneys and the judge discuss the administrative details of the trial: its length, witnesses, and any pretrial stipulations of fact or law to which the parties agree. GLOBAL Context Digital Archive Japan/Alamy Stock Photo A German Alternative to the Jury Trial Dramatic overtures to juries and last-minute surprise witnesses that are seen in American television and movie dramas exaggerate what ordinary American trials look like. But even real American litigation is more dramatic than Germany's. The American system is adversarial, meaning each side independently investigates and proffers their best case under the watch of the judge. German courts eschew the adversarial system for managerial judging. Unlike party-led discovery, the judge will lead investigative efforts. Cases are won in detailed briefs to the judge. The jury trial—the hallmark of the American system of justice—is notably absent from the German legal system. Indeed, the German litigation system consists of a series of investigations and hearings, with the judge holding almost total authority. Witness testimony is not recorded verbatim. Instead, the judge will question witnesses and summarize testimony. Neither

party gets to examine or cross-examine witnesses. Lawyers hold an oversight role, ensuring the judge does not add “spin” to the judicial summation of the proceeding. Why the stark difference? Judge-led inquiry can lead to judicial efficiency. For example, a contract case that rests on an illegality defense would require discovery of the whole case in American courts. A German judge who recognizes the crux of the case can direct attention to the pertinent matter, resolving the case quickly. Partisan proceedings can also lead to partisan witnesses. Can you really trust what a party-hired expert witness has to say? The German system disposes of these perverse incentives. However, the right to a jury is sacrosanct in America. Though the German judicial system may provide a government-led inquirer neutral to either party, the chance to try your case before your peers is seen as a safeguard against the government itself. The Trial If a plaintiff seeks at least $20 in monetary damages, the Seventh Amendment to the U.S. Constitution entitles the parties to a jury trial. The plaintiff must, however, demand a jury trial in her or his complaint. Some types of trials require 12-person juries, but 6-person juries hear most civil cases. If the plaintiff seeks an equitable remedy (an injunction or other court order) or if the parties have waived their right to a jury, a judge serves as the fact finder in the case. Page 49 Trials have six stages: jury selection, opening statements, examination of witnesses, closing arguments, conference on jury instructions, and posttrial motions. The following sections describe these stages. Jury Selection The jury selection process begins when the clerk of the courts randomly selects a number of potential jurors from the citizens within the court’s jurisdiction. Once the potential jurors have reported for jury duty, the voir dire, or jury selection, process begins. The voir dire process selects the jurors who will decide the case, as well as two or three alternate jurors who will watch the trial and be available to replace any juror who, for some legitimate reason, must leave jury duty before the trial ends. During voir dire, the judge and/or attorneys question potential jurors to determine whether they are able to render an unbiased opinion in the case. If a potential juror’s response to a question indicates that she or he may be biased, either attorney may challenge, or ask the court to remove, that potential juror “for cause.” For example, a lawyer could challenge for cause a potential juror who was a college roommate of the defendant. In most states, each party has a certain number of peremptory challenges. These peremptory challenges allow a party to challenge a certain number of potential jurors without giving a reason. Peremptory challenges, however, may lead to abuse. For example, in the past, attorneys have used peremptory challenges to eliminate a certain class, ethnic group, or gender

from the jury. In the 1986 case, Batson v. Kentucky,8 the U.S. Supreme Court ruled that race-based peremptory challenges in criminal cases violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. (Chapter 5 discusses the amendments to the Constitution in more detail.) The Supreme Court later extended the ban on race-based challenges to civil cases.9 Case 3-3 illustrates the successful use of a Batson challenge to a discriminatory use of peremptory challenges. Remember that while this illustrative case is a criminal case, the principle applies the same way to civil cases. Page 50 CASE 3-3 TIMOTHY TYRONE FOSTER, PETITIONER v. BRUCE CHATMAN, WARDEN Flowers v. Mississippi 139 S.Ct. 2228 (2019) FACTS: Curtis Flowers has been tried six separate times for the murder of four employees of a Mississippi furniture store. Flowers is black; three of the four victims were white. In five of the six trials, the state used its preemptory strikes exclusively against black jurors (no racial information existed regarding the prospective jurors in the fifth trial). Flowers was sentenced to death in his first three trials, but each verdict was overturned by the Mississippi Supreme Court based on prosecutorial misconduct. Flowers' fourth and fifth trials ended in mistrials. At the sixth trial, the state exercised six peremptory strikes—five against black prospective jurors, allowing one black juror to be seated. Flowers re-petitioned his case to the Supreme Court. ISSUE: Did the prosecutor improperly use its preemptory strikes to exclude black jurors? REASONING: Stretching across Flowers' first four trials, the state employed its peremptory strikes to remove as many Black prospective jurors as possible. The state appeared to proceed as if Batson had never been decided. The state's relentless, determined effort to rid the jury of Black individuals strongly suggests that the state wanted to try Flowers before a jury with as few Black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' Batson claim. The state's actions in the first four trials necessarily inform one's assessment of the state's intent going into Flowers' sixth trial. The state's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the state accepted one Black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the state from a Batson challenge. In Miller-El II, this Court skeptically viewed the state's decision to accept one Black juror, explaining that a prosecutor might do so in an attempt "to obscure the other-wise consistent pattern of opposition to "seating Black jurors. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the circum-stances here, the

state’s decision to strike five of the six Black prospective jurors is further evidence suggesting that the state was motivated in substantial part by discriminatory intent. In sum, the state’s pattern of striking Black prospective jurors persisted from Flowers’ first trial through Flowers’ sixth trial. In the six trials combined, the state struck 41 of the 42 Black prospective jurors it could have struck. At the sixth trial, the state struck five of six. At the sixth trial, moreover, the state engaged in dramatically disparate ques-tioning of Black and white prospective jurors. The prosecu-tors clearly violated Batson in striking the Black jurors. DECISION AND REMEDY: REVERSED and REMANDED in favor of Flowers. SIGNIFICANCE OF THIS CASE: This case demonstrates how Batson is applied in the juror selection process as well as how vital the juror selection process is to the outcome of a case. CRITICAL THINKING The Supreme Court in Batson v. Kentucky provided a three-step process for determining when a strike is discriminatory: “First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.” What possible problems might arise that prevent a court from rightfully determining a strike is discriminatory as happened in this case? What changes would you make to the three-step process to prevent further transgressions? ETHICAL DECISION MAKING Which values does this decision tend to emphasize? Page 51 Despite Batson, however, it is still not easy to challenge a dismissal as being based on race or gender. And in a 2006 case, the U.S. Supreme Court said that to find a dismissal unconstitutional, there must be no alternative to a gender- or race-based reason for dismissing a juror.10 The voir dire process has become more sophisticated over time. In cases involving significant amounts of money, rather than relying on their instinct or experience during jury selection, attorneys use professional jury selection services to identify demographic data to help select ideal jurors. Jury selection firms also provide additional services, including mock trials, in which mock jurors who are demographically similar to the real jurors hear the arguments and give feedback prior to the case, and shadow juries, in which shadow jurors sit in during the actual trial and deliberate at the end of each day to evaluate for the attorneys how each side is doing. Critics argue that jury selection services give an unfair advantage to one side when only one party can afford these services. Opening Statements Once the attorneys have impaneled, or selected, a jury, the case begins with opening statements. Each party’s attorney explains to the judge and jury what facts he or she intends to prove,

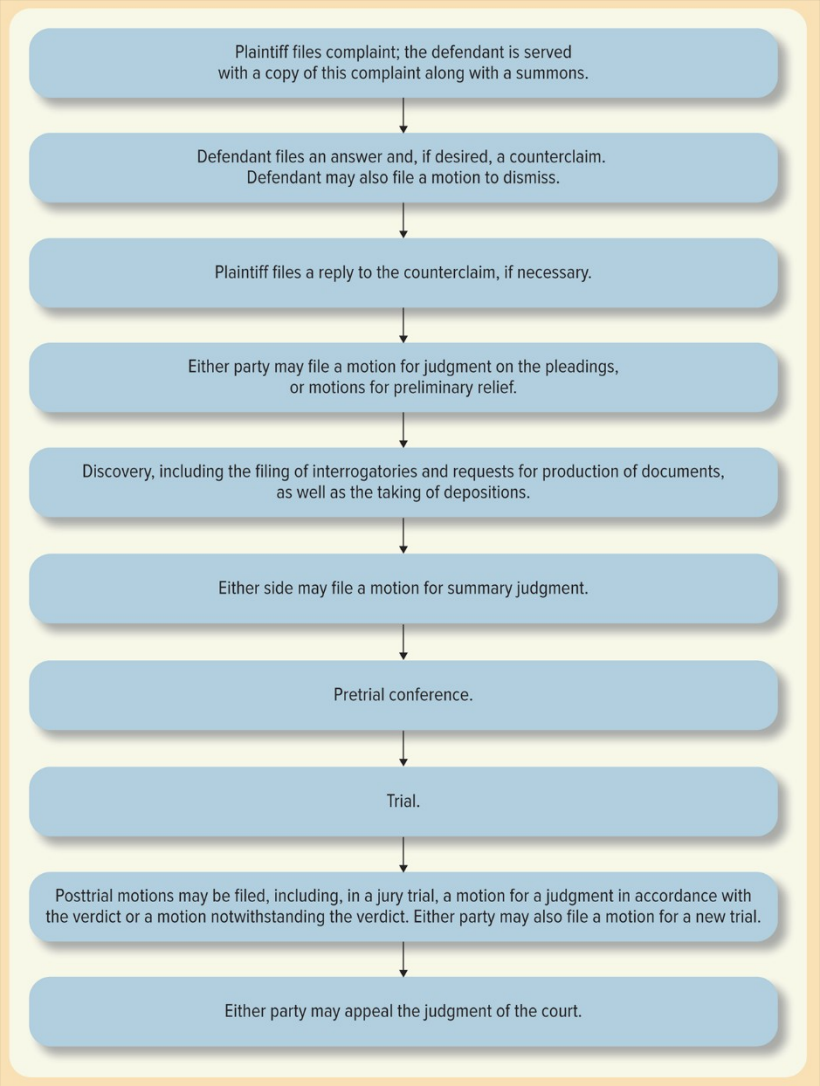
the legal conclusions to which these facts lead, and how the fact finder should decide the case based on those facts. The Examination of Witnesses and Presentation of Evidence Following opening statements, the plaintiff and defendant, in turn, present their cases-in-chief by examining witnesses and presenting evidence. The plaintiff has the burden of proving the case, meaning that if neither side presents a convincing case, the fact finder must rule in favor of the defendant. Thus, the plaintiff presents her case first. The procedure for each witness is the same. First, the plaintiff's attorney questions the witness in direct examination. The plaintiff's attorney asks the witness questions to elicit facts that support the plaintiff's case-in-chief. Questions must relate to matters about which the witness has direct knowledge. Attorneys cannot elicit hearsay from the witnesses. Hearsay is testimony about what a witness heard another person say. Hearsay is impermissible because the opposing attorney cannot question the person who made the original statement to determine the statement's veracity. The federal rules of evidence also prohibit attorneys from asking leading questions. Leading questions are questions that imply a specific answer. For example, an attorney cannot ask a witness, "Did the defendant come to your office and ask you to purchase stock from him?" Instead, attorneys must ask questions such as, "When did you first encounter the defendant?" After direct examination, opposing counsel may cross-examine the witness. Opposing counsel, however, may ask only questions related to the witness's direct examination. On cross-examination, attorneys can ask leading questions. Attorneys try to show inconsistencies in the witness's testimony, cast doubt on the claims of the plaintiff's case, and elicit information to support the defendant's case. After cross-examination, the plaintiff's attorney may conduct a redirect examination, a series of questions aimed at repairing damage done by the cross-examination. At the judge's discretion, opposing counsel has an opportunity to re-cross the witness to question her testimony on redirect examination. The parties follow this procedure for each of the plaintiff's witnesses. Immediately following the plaintiff's presentation of her case, the defendant may move for a directed verdict. This motion is a request for the court to direct a verdict for the defendant because even if the jury accepted all the evidence and testimony presented by the plaintiff as true, the jury would still have no legal basis for a decision in favor of the plaintiff. The federal court system refers to a motion for a directed verdict as a motion for a judgment as a matter of law. Courts rarely grant motions for a directed verdict because plaintiffs almost always present at least some evidence to support each element of the cause of action. If the court denies the defendant's motion for a directed verdict, the defendant then presents

his case. The parties question the defendant’s witnesses in the same manner as they questioned the plaintiff’s witnesses, except that the defendant’s attorney conducts direct and redirect examination and the plaintiff’s attorney conducts cross-examination and re-cross-examination. Closing Arguments After the defendant’s case, the attorneys present closing arguments. In closing arguments, each attorney summarizes evidence from the trial in a manner consistent with the client’s case. The plaintiff’s attorney presents closing argument first, followed by the defendant’s attorney, and the plaintiff has the option to present a rebuttal of the defendant’s closing argument. Page 52 Jury Instructions In a jury trial, the judge “charges the jury” by instructing the jurors on how the law applies to the facts of the case. Both sides’ attorneys submit statements to the judge explaining how they believe the jury should be charged. The judge’s instructions are usually a combination of both sides’ suggestions. After the judge charges the jury, the jurors retire to the jury room to deliberate. Once they reach a decision, they return to the courtroom, where the judge reads their verdict and discharges them from their duty. Trial procedures in the United States are quite different from trial procedures in other countries, as the Global Context box illustrates. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Trials in Japan Civil procedure in Japan differs significantly from American civil procedure. The Japanese legal system has no juries and no distinct pretrial stage. Instead, a trial is a series of discrete meetings between the parties and the judge. At the first meeting, the parties identify the most critical and contested issues. They choose one and recess to gather evidence and marshal arguments on the issue. At the next meeting, the judge rules on the chosen issue. If the judge decides against the plaintiff, the case is over. If the plaintiff wins, the process continues with the next issue. The process continues until the plaintiff loses an issue or until the judge decides all issues in the plaintiff’s favor, resulting in a verdict for the plaintiff. In addition, the discovery process in the Japanese court system is not as simple as it is in the United States. To obtain evidence, parties must convince the judge to order others to testify or produce documents. The judge can fine or jail parties who refuse to comply with such orders. Additionally, if a party does not comply with the judge’s requests for discovery, the judge may admit the facts the other party sought to discover. Posttrial Motions Once the trial ends, the party who received the favorable verdict files a motion for a judgment in accordance with the verdict. Until the judge enters the judgment, the court has not issued a legally binding decision for the case. The party who loses at trial has a number of available options. One option is to file a motion for a judgment notwithstanding the verdict, or judgment non obstante verdicto, asking the

judge to issue a judgment contrary to the jury’s verdict. To grant the motion, the judge must find that, when viewing the evidence in the light most favorable to the nonmoving party, a reasonable jury could not have found in favor of that party. In other words, as a matter of law, the judge must determine that the trial did not produce sufficient evidence to support the jury’s verdict. This motion is similar to a motion for a directed verdict, except the parties cannot make this motion until after the jury issues a verdict. The federal court system refers to this motion as a motion for judgment as a matter of law. The losing party can also file a motion for a new trial. Judges grant motions for a new trial only if they believe the jury’s decision was clearly erroneous but they are not sure that the other side should necessarily have won the case. A judge often grants a motion for a new trial when the parties discover new evidence, when the judge made an erroneous ruling, or when misconduct during the trial may have prevented the jury from reaching a fair decision. Appellate Procedure Either party may appeal the judge’s decision on posttrial motions, or on the final judgment. Sometimes, both parties appeal the same decision. For example, if a jury awarded the plaintiff $10,000 in damages, the plaintiff and the defendant may both appeal the amount of the judgment. Appellate courts, however, reverse only about 1 out of every 10 trial court decisions on appeal. Page 53 To be eligible for appeal, the losing party must argue that a prejudicial error of law occurred during the trial. A prejudicial error is a mistake so significant that it likely affected the outcome of the case. For example, a prejudicial error could occur if the judge improperly allowed hearsay evidence that enabled the plaintiff to prove an element of the case. To appeal a case, the attorney for the appealing party (the appellant) files a notice of appeal with the clerk of the trial court within a prescribed time. The clerk then forwards the record of appeal to the appeals court. The record of appeal typically contains a number of items: the pleadings, a trial transcript, copies of the trial exhibits, copies of the judge’s rulings on the parties’ motions, the attorneys’ arguments, jury instructions, the jury’s verdict, posttrial motions, and the judgment order. The appellant then files a brief, or written argument, with the court. Appellants file briefs to explain why the judgment in the lower court was erroneous and why the appeals court should reverse it. The attorney for the party who won in the lower court (the appellee) files an answering brief. The appellant may then file a reply brief in response to the appellee’s brief. Generally, however, appellants do not file reply briefs. The appeals court then usually allows the attorneys to present oral arguments before the court. The court considers these arguments, reviews the record of the case, and renders a decision. There are four possible decisions an appellate court can render. The court

can accept the lower court’s judgment by affirming its decision. Alternatively, the appellate court may conclude that the lower court’s decision was correct but the remedy was inappropriate, in which case it modifies the remedy. If the appellate court decides that the lower court was incorrect, it reverses the lower court’s decision. Finally, if the appeals court thinks the lower court committed an error but does not know how that error affected the outcome of the case, it remands the case to the lower court for a new trial. An appellate court usually has a bench with at least three judges. Appellate courts do not have juries; rather, the judges decide the case by majority vote. One of the judges who votes with the majority records the court’s decision and its reasons in the majority opinion. These decisions have precedential value—that is, judges use these prior appellate court decisions to make decisions in future cases. Also, these decisions establish new guidelines in the law that all citizens must follow. A judge who agrees with the majority’s decision but for different reasons may write a concurring opinion, stating the reasons used to reach the majority’s conclusion. Finally, judges disagreeing with the majority may write a dissenting opinion, giving their reasons for reaching a contrary conclusion. Attorneys arguing that a court should change the law frequently cite dissenting opinions from previous cases in their briefs. Likewise, appellate judges who change the law often cite dissenting opinions from past cases. For most cases, only one appeal is available. In states with both an intermediate and a final court of appeals, a losing party may appeal from the intermediate appellate court to the state supreme court. In a limited number of cases, the losing party can appeal the decision of a state supreme court or a federal circuit court of appeals to the U.S. Supreme Court. Appeal to the U.S. Supreme Court Every year thousands of individuals file appeals with the U.S. Supreme Court, but the Court hears, on average, only 80 to 90 cases each year. To file an appeal to the U.S. Supreme Court, a party files a petition asking the Court to issue a writ of certiorari, an order to the lower court to send to the Supreme Court the record of the case. The Court issues very few writs. The justices review petitions and issue a writ only when at least four justices vote to hear the case (the rule of four). The court is most likely to issue a writ in four instances: (1) The case presents a substantial federal question that the Supreme Court has not yet addressed; (2) multiple circuit courts of appeal have decided the issue of the case in different ways; (3) a state court of last resort has ruled that a federal law is invalid or has upheld a state law that may violate federal law; or (4) a federal court has ruled that an act of Congress is unconstitutional. If the Supreme Court does not issue a writ of certiorari, the lower court’s decision stands. Page 54 For a quick overview of

the steps of a civil lawsuit, see Exhibit 3-10. Exhibit 3-10Steps in a Civil Lawsuit


Plaintiff files complaint; the defendant is served with a copy of this complaint along with a summons.
Defendant files an answer and, if desired, a counterclaim. Defendant may also file a motion to dismiss.
Plaintiff files a reply to the counterclaim, if necessary.
Either party may file a motion for judgment on the pleadings, or motions for preliminary relief.
Discovery, including the filing of interrogatories and requests for production of documents, as well as the taking of depositions.
Either side may file a motion for summary judgment.
Pretrial conference.
Trial.
Posttrial motions may be filed, including, in a jury trial, a motion for a judgment in accordance with the verdict or a motion notwithstanding the verdict. Either party may also file a motion for a new trial.
Either party may appeal the judgment of the court.

Alternative Dispute Resolution Many firms find that using alternative dispute resolution (ADR) methods to resolve their legal problems offers many benefits. The term ADR refers to the resolution of legal disputes through methods other than litigation, such as negotiation, mediation, arbitration, summary jury trials, minitrials, neutral case evaluations, and private trials. Why might a business prefer ADR to litigation? First, ADR methods are generally faster and cheaper. According to the National Arbitration Forum,

the average time from filing a complaint to judgment through litigation is 25 months.11 Because ADR is faster, it is usually cheaper. According to the American Intellectual Property Law Association, for cases valued in the $1 million to $25 million range, the average total cost of patent litigation for each party through the close of discovery is $1.9 million.12 Through the end of trial, the average cost to each party is $3.5 million. Thus, if a party can resolve a dispute through alternative dispute resolution, this can save a significant amount of money. Page 55 Second, a business may want to avoid the uncertainty associated with a jury decision; many forms of ADR give the participants more control over the resolution of the dispute. Specifically, the parties can select a neutral third party, frequently a person with expertise in the area of the dispute, to help facilitate resolution of the case. Third, a business may want to avoid setting a precedent through a court decision. Fourth, a business may prefer ADR because it is confidential. Fifth, because many forms of ADR are less adversarial than litigation, ADR allows the parties to preserve a business relationship. Courts also generally support the use of ADR, which alleviates some of the pressure on the overwhelming court dockets. Congress has recognized the benefits of ADR methods through its enactment of the Alternative Dispute Resolution Act of 1998. This act requires federal district courts to have an ADR program along with a set of rules regarding the program. Additional evidence of congressional support for ADR comes from the passage of the Administrative Dispute Resolution Act, which mandates that federal agencies must create internal ADR programs.

Primary Forms of ADR LO 3-5 Compare the various forms of alternative dispute resolution used by businesses today. Negotiation Many business managers make frequent use of negotiation, a bargaining process in which disputing parties interact informally, either with or without lawyers, to attempt to resolve their dispute. No neutral third party is involved. Thus, negotiation differs from other methods of dispute resolution because the parties maintain high levels of autonomy. Some courts require parties to negotiate before they bring their dispute to trial. Before negotiation begins, each side must determine its goals for the negotiation. Moreover, each side must identify the information it is willing to give the other party. Because negotiation generally occurs in every case before a more formal dispute resolution method is chosen, negotiation is not necessarily considered an alternative to litigation. Mediation An extension of negotiation is mediation. In mediation, the disputing parties select a neutral party to help facilitate communication and suggest ways for the parties to solve their dispute.

Therefore, the distinguishing feature of mediation is that the parties voluntarily select a neutral third party to help them work together to resolve the dispute. The neutral third party frequently has expertise in the area of the dispute. Mediation begins when parties select a mediator. Each party then typically writes a mediation brief to explain why it should win. An important feature of mediation is that it allows multiple parties to participate in a dispute. The parties take turns explaining the dispute. One of the mediator's main goals is to help each party listen carefully to the opposing party's concerns. The mediator asks the parties to identify any additional concerns. The parties begin generating alternatives or solutions for the disputed points. The mediator helps the parties evaluate the alternatives by comparing the alternatives with the disputed points and interests identified earlier. Finally, the mediator assists the parties in agreeing on a solution. The mediation concludes when the agreement between the parties is reached. The agreement is then usually put into the form of a contract and signed by the parties. The mediator may participate in the drafting of the contract. If one of the parties does not follow the agreement, that party can be sued for breach of contract. However, parties typically abide by the agreement because they helped to create it.Page 56 If mediation is not successful, the parties can turn to litigation or arbitration to resolve their dispute. However, nothing said during the mediation can be used in another dispute resolution method; the mediation process is confidential. Advantages and Disadvantages of Mediation The primary advantage of mediation is that it helps the disputing parties preserve their relationships; this is especially attractive for businesses with a working relationship they would like to continue. A second advantage is the possibility of finding creative solutions. The goal of mediation is to find a compromise between the needs of various parties rather than to find one party right and all the others wrong. A third advantage is the high level of autonomy mediation gives the participants. Instead of a neutral third party pronouncing a solution, the interested parties work together to create a solution, and this can make them more committed to following the agreement afterward. These benefits can obviously be very worthwhile. However, we need to pay attention to the critics of the mediation process. One criticism of mediation is that it creates an image of equal parties working toward an equitable solution and thereby hides power imbalances that can lead to the party with greater power getting an agreement of greater benefit. A second criticism is that some people who enter mediation have no intention of finding a solution but, instead, use mediation as a tactic to draw out the dispute. Uses of Mediation Mediation is most commonly used in collective bargaining disputes because it allows the

workers to maintain a relationship with their employer while still having their needs addressed. Under the National Labor Relations Act (NLRA), a union must contact the Federal Mediation and Conciliation Services to attempt to mediate its demands before beginning a strike to achieve higher wages or better working hours. Similarly, the Equal Employment Opportunity Commission (EEOC) encourages the mediation of employment discrimination claims. The EEOC has a mediation program that uses mediators employed by the EEOC as well as external mediators trained in mediation and discrimination law. Mediation is also used extensively in environmental law because environmental disputes are often best served by finding a compromise between the frequently multiple parties. Arbitration One of the most frequently used methods of dispute resolution is arbitration, the resolution of a dispute by a neutral third party outside the judicial setting. Arbitration is frequently used in disagreements between employees and employers, and it is increasingly being used between consumers and businesses. Arbitration is often a voluntary process in that parties have a contractual agreement to arbitrate any disputes. This agreement may stipulate how the arbitrator will be selected and how the hearing will be administered. Lawyers, professors, and other professionals typically serve as arbitrators. The general qualifications for being an arbitrator are honesty, impartiality, and subject-matter competence. Additionally, arbitrators are expected to follow the Arbitrator's Code of Ethics. Typically, parties choose arbitrators from the Federal Mediation and Conciliation Services (FMCS), a government agency, or the American Arbitration Association (AAA), a private, nonprofit organization. The Arbitration Hearing The arbitration hearing is similar to a trial. Both parties present their cases to a neutral third party; parties may represent themselves or use legal counsel. During this presentation, the parties may introduce witnesses and documentation, cross-examine the witnesses, and offer closing statements. The fact finder offers a legally binding decision. However, arbitration is also different from a trial in several ways. First, the arbitrator often takes a much more active role in an arbitration hearing than a judge takes in a trial, and the arbitrator can question witnesses. Second, no official written record of the hearing is kept in most arbitrations. Third, the rules of evidence applicable in a trial are typically relaxed in arbitration. The Arbitrator's Award The arbitrator typically provides a decision within 30 days of the arbitration hearing. The arbitrator's decision is called an award, even if no monetary compensation is awarded. The arbitrator's decision differs from a judge's decision in several ways. The arbitrator does not have to state any findings of fact, conclusions of law, or reasons to support the award, and he or she is not as bound by precedent as

a judge is. Also, because the arbitrator was hired to resolve a dispute between two parties, the arbitrator is more likely to make a compromise ruling instead of a win-lose ruling. Page 57 Unlike the case in most other forms of ADR, the arbitrator's decision is legally binding. In certain cases, a decision may be appealed to the district court. However, few of these cases are appealed. The courts give extreme deference to arbitrators' decisions. The Federal Arbitration Act (FAA), the federal law enacted to encourage the use of arbitration, explicitly lists four grounds on which an arbitrator's award may be set aside: (1) The award was the result of corruption, fraud, or other undue means; (2) the arbitrator displayed bias or corruption; (3) the arbitrator refused to postpone the hearing despite sufficient cause, refused to hear relevant evidence, or otherwise misbehaved to prejudice the rights of one of the parties; and (4) the arbitrator exceeded his or her authority or failed to use that authority to make a mutual, final, and definite award. In a 2008 decision, the U.S. Supreme Court held that these grounds are the only grounds for appeal and that the parties in an arbitration proceeding do not have the ability to give the courts additional grounds to set aside a decision.13 Consequently, in the United States, arbitration decisions are generally upheld. In fact, the Fifth Circuit recently held that "manifest disregard of the law and contrary to public policy are the only nonstatutory bases recognized by this circuit for the vacatur of an arbitration award."14 Advantages and Disadvantages of Arbitration Arbitration may be preferable to litigation for several reasons. First, arbitration is more efficient and less expensive. Second, parties have more control over the process of dispute resolution through arbitration. They choose the arbitrator and determine how formal the process will be. Third, the parties can choose someone to serve as the arbitrator who has expertise in the specific subject matter. Fourth, the arbitrator has greater flexibility in decision making than a judge has. Unlike judges, who are bound by precedent, arbitrators generally do not have to offer reasons for their decisions. However, arbitration is not without its critics. First, arbitration panels are being used more frequently, resulting in a loss of some of the prior advantages of arbitration, such as efficiency and lower cost. Second, because appealing an arbitration award is so difficult, some scholars argue that injustice is more likely to occur. Third, some individuals are concerned that by agreeing to give up one's right to litigate, one may be losing important civil rights or giving up important potential remedies without really understanding which rights are being given up. Fourth, some scholars are afraid that if more and more employers and institutions turn to mandatory arbitration, it will become more like litigation. Fifth, some scholars are concerned about the privacy associated with

arbitration. Companies and employers are able to hide their disputes through arbitration. Binding Arbitration Clause Given the benefits associated with arbitration, parties may voluntarily submit their cases to arbitration. The primary method of securing arbitration is through a binding arbitration clause, a provision in a contract that mandates that all disputes arising under the contract must be settled by arbitration. The clause also typically states how the arbitrator will be selected. If parties have a binding arbitration agreement, the parties must resolve the dispute through arbitration. Both federal and state courts must uphold agreements to arbitrate. The Case Nugget illustrates the courts' willingness to enforce binding arbitration agreements. A constraint on binding arbitration clauses is that they must be drafted in a way that ensures that the courts do not see them as unconscionable. An unconscionable contract provision has been defined as one in which the terms are "manifestly unfair or oppressive and are dictated by a dominant party."15 The doctrine has been used most often to strike down binding arbitration clauses in consumer and employment contracts. Exhibit 3-11 offers tips on creating a binding arbitration clause. Exhibit 3-11Tips for Creating a Binding Arbitration Clause Overall, make sure the clause treats both parties fairly. Be clear and unmistakable about what you wish to arbitrate. The arbitration clause must be bilateral. State explicitly which party will pay the arbitrator's fees, and make sure that it will not cost the non-drafting party more to arbitrate than it would have cost to litigate. Specify how the arbitrator will be selected. Spell out the costs associated with the arbitration. Avoid limitations on the remedies available to the parties. Consider potential parties when determining where to hold the arbitration. Page 58 CASE Nugget The Validity of Binding Arbitration Agreements Preston v. Ferrer United States Supreme Court 128 S. Ct. 978 (2008) Under the FAA, is an administrative proceeding the same as a trial? It has long been held that under the FAA, even if state statutes refer a state law controversy initially to a judicial forum, if the parties have agreed to submit that dispute to arbitration, the dispute must be arbitrated. Until 2008, however, the question existed of whether the same rule would apply when the state law directed that the first mode of resolution must be an administrative proceeding rather than a court hearing. In this case, the U.S. Supreme Court ruled that for purposes of the FAA, an administrative proceeding was the equivalent of a judicial proceeding. In Preston v. Ferrer, the two had included a binding arbitration agreement in a contract for Preston to represent Ferrer. When Preston attempted to collect his fees, a question arose about whether the matter had to be resolved by the California Labor Commission, which had jurisdiction over issues arising under the

California Talent Agencies Act. The high court agreed with Ferrer that the dispute must be resolved through arbitration because the FAA preempted the state law. Even if a state law provides that an administrative forum has jurisdiction over a specific type of dispute, a binding arbitration agreement will supersede the forum declared by the state law.

Other ADR Methods Med-arb Med-arb is a dispute resolution process in which the parties agree to start out in mediation and, if the mediation is unsuccessful on one or more points, to move on to arbitration. In some cases, the same neutral third party may participate in both the mediation and the arbitration. Some critics argue that if parties know that the mediator may become the ultimate decision maker, they will be less likely to disclose information during the mediation stage. Others argue that having the same neutral mediator-arbitrator offers faster resolution because the third party is familiar with the facts of the case.16 Summary Jury Trial Page 59A summary jury trial is an abbreviated trial that leads to a nonbinding jury verdict. Two advantages are inherent in this method of dispute resolution. First, it is quick; a summary jury trial lasts only a day. Second, because a jury offers a verdict, both parties get a chance to see how their case would fare before a jury of their peers. Each judge can set his or her own rules. The judge advises the jury on the law, and each party’s lawyer presents an opening statement and a limited amount of evidence before the jury. The lawyers have limited time for their presentations, and witnesses do not usually testify. The jury reaches an advisory verdict, although the jury does not know that its verdict is nonbinding. The parties then enter into a settlement conference, where they decide to accept the jury verdict, reject the verdict, or settle on some compromise. Approximately 95 percent of cases are settled at this time. However, if the case is not settled, it will go to a regular trial. At that trial, nothing from the summary jury trial is admissible as evidence. Minitrial A minitrial is similar to arbitration and mediation because it involves a neutral third party. However, despite the presence of a neutral third party, business representatives of the disputing corporations participate and have settlement authority. Lawyers for each side present their arguments before these executives and the neutral adviser, who then offers an opinion as to what the verdict would be if the case went to trial. The neutral adviser’s opinion, like the jury’s verdict in a summary jury trial, is not binding. Next, the corporate executives discuss settlement options. If they reach an

agreement, they enter into a contract that reflects the terms of the settlement. Early Neutral Case Evaluation With early neutral case evaluation, the parties select a neutral third party and explain their respective positions to this neutral, who then evaluates the strengths and weaknesses of the case. The parties use this evaluation to reach a settlement. Eighteen federal district courts currently use early neutral case evaluation.17 Private Trials Page 60Several states allow private trials, an ADR method in which a referee is selected and paid by the disputing parties to offer a legally binding judgment in a dispute. The referees do not have to have any specific training; however, because retired judges often serve as referees, this method is often referred to as “rent-a-judge.” The cases are often heard privately to ensure confidentiality. The referee writes a report and files it with the trial judge, but a dissatisfied party reserves the right to request a new trial before a trial court judge. Private jury trials with experienced jury members are becoming more popular today as well. Private trials have been criticized because they seem to provide faster and cheaper justice for those who can afford the initial fee and because they hide the trial from the public eye. Exhibit 3-12FORMS OF ADR CASE OPENER WRAP-UP Questionable Jurisdiction over Caterpillar The timing of events was crucial to the outcome of the Caterpillar case. At the time Lewis filed the case in the state court system, one of the defendants and the plaintiff were from the same state, so the state court system had jurisdiction. Once the supply company reached an agreement with Lewis, the other defendant, Caterpillar, filed a motion to exercise its right of removal because diversity of citizenship existed in the absence of the Kentucky defendant. But the agreement was not final at the time of the motion because the agreement was subject to the insurer’s approval. Thus, the appellate court ruled that because the supply company was still a party to the agreement, the federal court system could not exercise jurisdiction over the case. The U.S. Supreme Court, however, overruled the appellate court. The Supreme Court ruled that the state court should not have granted Caterpillar’s initial motion to remove the case because at the time of removal, the insurer had not accepted the settlement agreement, the supply company remained a party in the case, and, therefore, the diversity of citizenship was not complete. The Supreme Court held further, however, that the district court’s error in hearing the case was not fatal because the settlement agreement was approved and the case satisfied the jurisdictional requirements by the time the federal court issued its decision. The Court ruled that to require the district court to send the case back to the state system would be an undue waste of judicial resources. Why might Caterpillar have wanted to move the case to the federal court system?

First, the case involved product liability claims. Data suggest that average damage awards in product liability cases tend to be higher in state courts than in federal courts. Second, Caterpillar may have feared local prejudice. While all judges must strive for neutrality, out-of-state defendants may fear that state judges are slightly biased in favor of in-state parties. PRACTICAL TIPS for Business Managers As a manager, take some time to familiarize yourself with basic legal terms and concepts (reading this book is a great way to do so!). Your primary job is to help run a business, sure, but even when things seem to be going well, legal disputes involving you, your employees, or your business can arise without warning. Should a situation occur such that you need to be involved in litigation, you do not want to be going in blind. You also want to be able to understand what your lawyer means when he speaks to you using legal terminology. For better or for worse, the U.S. legal system values justice over efficiency. Thus, trials and litigation are time-consuming and expensive processes that are tedious for just about everyone involved. Many trials, especially those involving contract or employment disputes, can be largely avoided if proper care is taken to ensure that contracts and agreements are properly and thoroughly drafted. Insist that all contracts and agreements are properly and thoroughly drafted. Insist that all contracts and agreements your business makes are in writing and consider hiring a lawyer to make sure they cover most contingencies. You may be saving yourself a lot of time and money down the road. Remember that although ADR is generally less resource-intensive than a trial, it still has certain disadvantages when compared to trial litigation. The spirit of ADR is one of compromise, whereas trials have a definite winner and loser. If you think your business has a strong case and stands to gain much more from a trial than ADR despite the costs of a trial, litigation may actually be the better option, so do not be hesitant to go to trial when circumstances dictate that litigation is the best option for your firm.

NEGOTIATION	Informal discussions between disputing parties in an attempt to resolve the conflict.
MEDIATION	A neutral third party facilitates discussion between disputants in an attempt to help them reach a resolution of their dispute.
ARBITRATION	Resolution of the dispute by a neutral third party outside the judicial setting.
MED-ARB	Parties agree to attempt to solve the dispute through mediation, but will shift to arbitration if mediation is not successful.
SUMMARY JURY TRIAL	An abbreviated trial that results in a nonbinding jury verdict.
MINITRIAL	A form of dispute resolution available only to corporations that uses corporate executives, along with a neutral third party, to resolve the dispute.
EARLY NEUTRAL CASE EVALUATION	Use of a neutral third party to evaluate the strengths and weakness of each side to aid them in negotiating a settlement.
PRIVATE TRIALS	A dispute process similar to litigation, except a retired judge is used to solve the dispute and the process is private.

SUMMARY Page 61 Jurisdiction In personam jurisdiction is the power of a court to render a decision affecting a person’s legal rights. Subject-matter jurisdiction is the power of a court to render a decision in a particular type of case. The three forms of subject matter jurisdiction are state, exclusive federal, and concurrent. Venue Venue is the geographic location of the trial. The Structure of the Court System The United States has two parallel court structures: the state and federal systems. The federal structure has district courts (trial courts), circuit courts of appeal, and the U.S. Supreme Court. The state court structure varies by state but generally includes courts of common pleas (trial courts), state courts of appeal, and a state supreme court. Threshold Requirements Standing: For a party to have the legal right to file a case, the outcome of the case must personally affect that party. Case or controversy: There must be an issue before the court that a judicial decision is capable of resolving. Parties cannot ask the judge for an advisory opinion. Ripeness: The case cannot be moot; it must be ready for a decision to be made. Steps in Civil Litigation The stages of a civil trial include the pretrial, trial, posttrial, and appellate stages. Pretrial includes consultation with attorneys, pleadings, the discovery process, and the pretrial conference. The trial begins with jury selection, followed by opening statements, the plaintiff’s case, the defendant’s case, closing arguments, jury instructions, jury deliberations, the jury’s verdict, and the judgment. After the trial, parties may file posttrial motions. The parties may then file appeals to the appropriate appellate court and, in some cases, to the U.S. Supreme Court. Alternative Dispute Resolution Alternative dispute resolution is a way to

settle problems without having to go to a costly and time-consuming trial. Primary Forms of ADR The primary forms of ADR are negotiation, mediation, and arbitration. Other ADR Methods Other methods of ADR include med-arb, summary jury trials, minitrials, early neutral case evaluation, and private trials.

Point/Counterpoint Should Courts Increase Their Use of Service by Social Media? YES NO The traditional methods of service of process are antiquated and expensive, especially if we are talking about serving someone who is out of the country. Think about how much it costs to track down someone's physical address and then serve him in person or by registered or regular mail. It is a lot easier to find someone's electronic address than it is to find their physical address. Just type their name into Google and you will immediately get their Facebook or Linked In page, their Twitter or Instagram account, or their blog. And everyone regularly is on Facebook or checks their Twitter feed. People have their smartphones with them all the time, so the service would be almost instant. Who even checks their regular mailbox anymore? And when we are talking about serving businesses, an increasing number of businesses don't even have a posted physical address. They are primarily a web presence. We do everything online these days . . . shopping, banking, getting a mortgage. Shouldn't courts move into the twenty-first century and start using social media as a preferred method of service? Service of process is designed to ensure that a person's due process right of notice of a potential deprivation of his property is about to occur. Given the importance of this right, courts need to think very carefully before rushing to allow service by social media. The traditional methods of service of process have been shown over time to ensure that defendants have adequate notice of lawsuits filed against them. It is too easy for someone to set up a fraudulent Facebook page, and then the notice would go to someone to whom it was not intended. Besides, a number of people may have the same name, so there is no guarantee that the "Jim Smith" you serve via his Facebook page is the "Jim Smith" you intended to serve. Another problem is that many people just get overwhelmed by social media. They may regularly check their Facebook posts and then may decide they need to quit wasting so much time, so they quit reading their Facebook posts for a while. What if they receive service during that time period? And, of course, those who advocate for the use of service by social media are focused on those who have access. We cannot forget the digital divide. Even today, not everyone owns a smartphone or a computer. But most people have a home and a

mailbox. The traditional methods of service have been working just fine for decades. If something isn’t broken, there is no need to try to fix it.

Questions & Problems Page 63 Explain the two types of jurisdiction that a court must have to hear a case and render a binding decision over the parties. Explain the differences between trial courts and appellate courts. Identify and define the alternative tools of discovery. Explain the three threshold requirements a plaintiff must meet before he or she can file a lawsuit. The citizens of each state elect state court judges. The president, on the other hand, appoints federal court judges for lifetime positions. Why might this difference lead to different rulings on similar cases? Which method —election or appointment—do you like better? Why? What are the advantages and disadvantages of each method? Missouri was International Shoe Corporation’s principal place of business, but the company employed between 11 and 13 salespersons in the state of Washington, who exhibited samples and solicited orders for shoes from prospective buyers in Washington. The state of Washington assessed the company for contributions to a state unemployment fund. The state served the assessment on one of International Shoe Corporation’s sales representatives in Washington and sent a copy by registered mail to the company’s Missouri headquarters. International Shoe’s representative challenged the assessment on numerous grounds, arguing that the state had not properly served the corporation. Is the corporation’s defense valid? Why or why not? Source: International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Robinsons, residents of New York, bought a new Audi car from Seaway Volkswagen Corp., a retailer that was incorporated in New York and had its principal place of business there. World-Wide Volkswagen, a company incorporated in New York and doing business in New York, New Jersey, and Connecticut, distributed the car to Seaway. Neither Seaway nor World-Wide did business in Oklahoma, and neither company shipped cars there. The Robinsons were driving through Oklahoma when another vehicle struck their Audi in the rear. The gas tank of the Audi exploded, injuring several members of the family. The Robinsons brought a product liability suit against the manufacturer, distributor, and retailer of the car in an Oklahoma state court. Seaway and World-Wide argued that the Oklahoma state court did not have in personam jurisdiction over them. After the state’s trial court and supreme court held that the state did have in personam jurisdiction over Seaway and World-Wide, they appealed to the U.S. Supreme Court. How do you think the Court decided in this case? Why? Source: World-Wide Volkswagen Corp. v.

Woodson, 444 U.S. 286 (1980). The John Gore Organization owns and operates the Charles Playhouse, a theater in Boston, Massachusetts. Evelyn Castillo has diabetes, a disability under the Americans with Disabilities Act (ADA). Castillo wished to purchase a ticket to see a concert at the Charles Playhouse. However, upon visiting the theater's website, she discovered that the theater had a policy prohibiting patrons from bring outside food into the theater. This was an issue for Castillo; due to her diabetes, she must have specific types of snacks with her at all times in case her blood sugar drops suddenly. After reading the policy, Castillo decided not to purchase a ticket. Castillo sued the organization, claiming that she was denied access to the theater because of her disability. In its response, the organization pointed to Castillo's claims that she had never visited the theater—or Boston, for that matter—in the past. Castillo claimed that she did not attempt to attend an event at the theater "because she understood defendant's discriminatory policy and knew such an attempt would be futile. Ultimately, the organization moved to dismiss the claim for lack of standing. How do you think the court ruled? Source: Castillo v. John Gore Org., Inc., 19-cv-386 (arr)(PK)(E.D.N.Y., Nov. 14, 2019). Increasingly, we are seeing email used in cases involving defendants located in foreign countries. Plaintiffs filed suit against four Defendants: Qingdao Sunflare New Energy Co. Skone Lighting Co., Sailing Motor Co., and Guangzhou LF Sky Energy Technology Co., serving all defendants via email. Plaintiff subsequently filed a motion with the court requesting an order deeming the service effectuated via email. The court granted the motion with respect to defendants Guangzhou and Qingdao, but denied the motion with respect to the other two defendants without prejudice. With permission of the court, plaintiffs then submitted the following supplemental evidence as to why the motion should also be granted for the other two defendants: Lighting held out the email address at issue as its preferred contact information. The same address was provided to a website domain registrar in its website registration materials. Additionally, email tracking measures utilized by plaintiffs indicate that emails to the Skone Lighting email address were sent successfully, and no "bounceback" was received suggesting that the email was not delivered. The situation involving Sailing Motor was similar. The email address appears on Sailing Motor's price sheet. A man who identified himself as the owner of the company provided the email address as the company's contact information to plaintiffs' investigators, and plaintiffs' investigators communicated via that email address to facilitate the purchase of allegedly infringing products. Upon reconsideration, do you think the court granted or denied the plaintiff's motion? Why or why not? Source: D.Light Design, Inc., et al., v. Boxin Solar

Co., Ltd., et al., 2015 U.S. Dist. LEXIS 14683. In 2012, Janet Napolitano, U.S. Secretary of Homeland Security, released a memo outlining a policy which became known as Deferred Action for Childhood Arrivals (DACA). The policy directed relevant agencies to defer the removal of illegal aliens who were eligible for DACA. In 2014, Napolitano's successor, Jeh Johnson, revised the DACA program to extend the duration of deferred removal and outlined a new policy known as DAPA that enabled eligible parents of American citizens to be deferred from removal. In November 2014, President Obama announced the changes to DACA and the new DAPA. That very day, Joseph Arpaio, the elected sheriff of Maricopa County, Arizona, sued Obama and other federal officials to enjoin the deferred action policies. Arpaio asserted that DACA and DAPA were unconstitutional, arbitrary and capricious, and invalid under the Administrative Procedures Act. For the court to review the claim, Arpaio must have Article III standing. Sheriff Arpaio argues that he has standing because the deferred action policy will act as a magnet and draw more undocumented aliens into Maricopa County, where they will commit crimes, and deferred action policies will decrease the total deportations of six million eligible undocumented aliens so that more individuals will be present in Maricopa County and commit crimes. Arpaio's argument is based on the premise that more people causing more crimes will harm him because he will be forced to spend more money policing the county and running its jails. The judge ruled against Arpaio, reasoning that he had failed to establish the three elements of standing. What are the three elements of standing? Based on the three elements, why did the judges rule against Sheriff Arpaio? Give a reason for each element. Source: Joseph M. Arpaio v. Barack Obama, 2015 U.S. App., LEXIS 14270. Martina Beverly sued her former employer, Abbott Laboratories (Abbott), for employment discrimination and retaliation. During a private mediation, the parties signed a handwritten agreement stating that Beverly demanded $210,000 and mediation costs in exchange for dismissing the lawsuit. Abbott later accepted Beverly's demand and circulated a more formal settlement proposal. After Beverly refused to execute this draft proposal, Abbott moved to enforce the original handwritten agreement. The district court found that the parties entered into a binding settlement agreement and granted Abbott's motion to enforce. Beverly appealed this decision, arguing that the handwritten agreement was merely a preliminary document that captured the parties' intention to execute a binding settlement agreement in the future, and that Abbott intended to be bound only by the terms of the typewritten final agreement. How do you think the appellate court should have decided this case? Why? Source: Beverly v. Abbott Laboratories, 817 F.3d 328 (2016). Asbestos, a fibrous type of

material once used in insulation products, is now widely known to be correlated with health problems. Walter Brown was exposed to asbestos while he was an Air Force mechanic stationed in Europe and the United States. Additionally, Walter Brown was diagnosed with and died from malignant mesothelioma, a cancer thought to be caused by asbestos exposure. Prior to passing away, Walter Brown brought suit against Lockheed Martin and thirteen other companies in the Connecticut Superior Court, seeking to recover in tort for injuries sustained while working as an Air Force mechanic. Cindy S. Brown, Walter Brown's daughter, took up the mantle and replaced Walter Brown as the plaintiff after his passing. Lockheed Martin is an American global aerospace, defense, security, and advanced technologies company with worldwide interests. Having physical presence in Connecticut since 1982, Lockheed finally obtained a formal certificate to do business in the state in 1995. The company does not own property in the state, but has leased the same space in New London, Connecticut, since 1997 in addition to at least three other properties. Lockheed Martin, citing its status as a federal contractor, removed the case to the Connecticut District Court and subsequently moved to dismiss the case for lack of personal jurisdiction. The Connecticut District Court dismissed the case, and Cindy Brown filed an appeal with the Second Circuit Court. Do you think the Connecticut District Court has jurisdiction over Lockheed Martin? Why or why not? Source: Brown v. Lockheed Martin Corp., 814 F. 3d 619 (2016).